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Oct. 2. 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 714.

THE CITY OF LITTLE ROCK, PLAINTIFF IN ERROR,

vs.

THE MERCHANTS' NATIONAL BANK OF LITTLE ROCK, ARKANSAS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED JULY 27, 1878.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judge of the circuit court of the United States for the eastern district of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between the Merchants' National Bank of Little Rock, Ark., plaintiff, and the City of Little Rock, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the records and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 14th day of June, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the one hundred & second.

[SEAL.] RALPH L. GOODRICH,
Clerk of the Circuit Court of the United States of America for the Eastern District of Arkansas.

Allowed by—

HENRY C. CALDWELL,
District Judge.

The execution of the within writ of error appears by the schedule hereto attached.

RALPH L. GOODRICH, *Clerk.*

2 Be it remembered that on October 1, 1877, and October 4, 1877, came into the office of the clerk of the circuit court of the United States for the eastern district of Arkansas the Merchants' National Bank of Little Rock, by John McClure, its attorney, and filed therein its complaints against the City of Little Rock, which complaint, filed October 1, 1877, is as follows:

THE MERCHANTS' NATIONAL BANK OF LITTLE ROCK, ARKANSAS, plaintiff,
against
THE CITY OF LITTLE ROCK, ARKANSAS, DEFENDANT.

The plaintiff, the Merchants' National Bank of Little Rock, Ark., complains of the defendant, the City of Little Rock, Ark, and states:

That the plaintiff is a banking association, created by and under the laws of the United States, organized as such, pursuant to an
3 act entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation

and redemption thereof," approved June 3rd, 1864, and acts supplementary thereto and amendatory thereof.

That the City of Little Rock, the defendant herein, prior to the 1st of January, 1867, was, and at all times since said last-named day has been, and now is, a municipal corporation and a body-politic, with certain corporate powers, organized and existing as such under the constitution and laws of the State of Arkansas, capable of sueing and being sued.

For 1st cause of action, plaintiff states:

That the defendant, the said City of Little Rock, under the organic act in force at the time aforesaid, was, among other things, fully authorized and empowered by the charter of said city and the public laws of said State, in the execution of its corporate powers, to contract
4 and be contracted with, and of sueing and be sued, to purchase, build, establish, and maintain schools and school-houses, and purchase sites therefor; to establish and maintain a city police and police court, a board of health, markets and market places, levees, wharves, docks, piers, and landing-places, and to purchase grounds for any of the purposes aforesaid; to provide a supply of water for said city, maintain a fire department; to open, widen, lay off, extend, straighten, and establish streets and alleys, and improve the same; to light streets and alleys and landing-places; to open, construct, and keep in order sewers and drains; to borrow money on the credit of the city and execute bonds for the payment of the same, and to pay any and all expenses and debts incurred in the execution of any or all of the foregoing powers, as well as for the payment of officers and persons employed by or serving said corporation.

5 That the defendant, said City of Little Rock, on the 22nd of January, 1867, being authorized to borrow money on the credit of said city and issue bonds for the payment thereof, did, on said 22nd day of January, 1867, order, direct, and authorize that the bonds of said city of Little Rock, to the amount of fifty thousand dollars, be issued for the purpose of enabling said city to inaugurate a system of free common schools, and in the further sum of fifty thousand dollars, to be expended as the wisdom of the city council thereafter might direct, in the lawful execution of some one or more of its corporate powers. All of which will more fully appear by the record of the proceedings of the city council of Little Rock, a copy of which is hereto attached, so far as the same relates to this subject, and made a part hereof, marked "A."

That the defendant, the said City of Little Rock, in the execution of the order referred to in the preceding paragraph, in relation to
6 the issue of bonds, caused the same to be executed of the following denominations, to wit.

9,300	of the	denomination	of	.....	$1 00
9,000	"	"	"	.....	2 00
7,000	"	"	"	.....	5 00
3,000	"	"	"	.....	10 00
100	"	"	"	.....	20 00
2	"	"	"	.....	50 00
1	"	"	"	.....	100 00

That all of said bonds were made payable to bearer, from one to ten years after the date thereof, with eight per cent. interest per annum, at maturity and by the terms of a resolution of said city council were to

be receivable in payment of all city dues, and by an act of the general assembly of the State of Arkansas, passed after the issue of said bonds, were made receivable for all taxes and debts due said city except interest tax.

Plaintiff states that all of said bonds were, by order and under the direction, sanction, and authority of the defendant, the said City of Little Rock, its city council and corporate officers, expended and
7 used, at par value, in the payment and satisfaction of debts contracted by said city of Little Rock, for and in the purchase of sites for school-houses for said city, the building of school-houses thereon and the support of schools therein, in the paying off and in extending the time of payment of the past-due interest coupons of the bonded debt of said city, in the payment and extending of the time of payment of the maturing bonds of said city and other obligations thereof, which had been lawfully contracted by said city, and in the payment of debts and in extending the time of payment of debts of said city of such of its creditors who were willing to accept said bonds and surrender warrants drawn in their favor by the officers and authority of said city, in satisfaction and liquidation of debts due them, and to whom said city was justly indebted for labor and services performed and material and property sold and delivered to said city, and by it
8 used in the execution of some one or more of its corporate powers.

That all of said bonds issued by the defendant, the City of Little Rock, in the hands of those receiving the same, and their assigns, represented the whole or some portion of the amount of a warrant lawfully and legally issued by said city of Little Rock, to some person or persons named therein, which had been given such person or persons by order of the city council of said city and its corporate authorities, for an amount found due such person or persons, for labor and service rendered said city, or material and property furnished the same, at its request, and in the execution of a corporate power, which said warrant was surrendered to said city on the reception from the treasurer thereof of the bonds so issued as aforesaid, or were received by persons in extending the time of payment of a just and valid debt against said city, which was and theretofore had been evidenced by proper and lawful
9 acknowledgment thereof, which had become due, and which said proper acknowledgment of such debt was surrendered to said treasurer and cancelled by said city authorities, by the delivery of the bonds aforesaid in satisfaction thereof.

Plaintiff states that between the time of the issued of the bonds aforesaid, by said city of Little Rock, and the ninth day of October, 1874, in the ordinary course of its business, it made quite a number of loans and discounts to various persons.

That many of the loans and discounts were originally secured, in addition to personal security, by the deposit, as collateral, of the warrants of the city of Little Rock, which said warrants, for its own protection, it has been compelled to purchase.

That the warrants thus obtained have, at divers times, been surrendered by the plaintiff to the said city of Little Rock, and bonds of said city, so issued as aforesaid, received in satisfaction of such warrants.

10 That to save itself from loss, the plaintiff has, on various occasions, taken from persons to whom it has made loans and discounts, warrants of said city, which had been issued in evidence of a just and valid debt; and that the warrants of such city, received in the manner herein stated, were afterwards, by the plaintiff, presented to said city for pay-

ment, and that in payment thereof the said city delivered to the plaintiff the bonds of the city of Little Rock, so issued as aforesaid; and that in other instances, to save itself from loss, by reason of loans and discounts made, it has been compelled to receive bonds of the city of Little Rock, which said city had delivered to persons in settlement of warrants of said city, which were cancelled, taken up, and destroyed, on the delivery of the bonds of said city to the person presenting such warrant.

Plaintiff states that by the provisions of an act of the general assembly of the State of Arkansas, approved April 9, 1869, it is, among
11 other things, provided that the city council of any city, for the purpose of extending the time of payment of any indebtedness theretofore contracted, and which, from the limit of taxation, such city was unable to pay at maturity, shall have the power to issue bonds, or borrow money, so as to change, but not increase, the indebtedness, in such amounts, not less than fifty dollars, and for such length of time, and at such rate of interest, not more than ten per cent. per annum, as such council may deem proper.

Plaintiff states the bonds aforesaid, issued as aforesaid, represented, at the time they were delivered, the whole or a fractional part of a just and valid indebtedness of the city of Little Rock, which the city council of said city had found to be legally due some person or persons, and in whose favor the warrant or other evidence of debt of said city had issued, and which said warrant or other evidence of debt
12 had been surrendered to said city on the receipt of the bonds of the city of Little Rock, so issued as aforesaid, and that said bonds so issued as aforesaid represent no other consideration whatever, and that the limit of taxation was such between the date of the issue of the bonds aforesaid, by said city of Little Rock, and the maturity thereof, that said city did not possess the power to levy a sufficient tax to pay the same off, and at the same time conduct the affairs of said city.

That the city council of the city of Little Rock, under and by virtue of the authority vested in it by law, by ordinance provided "that the holder of any of the bonds of the city of Little Rock, which were issued prior to the ninth day of April, 1869, which said city had issued in the form of bank-notes, on bank-note paper, in the manner and under the circumstances herein stated, might present the same to the presi-
13 dent of the city council, and on the surrender of said bonds, in any sum not less than fifty dollars, have a new bond issued therefor, with the interest due thereon, bearing interest at the rate of ten per cent. per annum, payable twelve months after the date thereof," all of which will more fully appear by said ordinance, a copy of which is hereto attached and made a part hereof, marked "B."

That the plaintiff on the ninth day of October, 1874, surrendered and turned over to the president of the city council an amount of bonds of the city of Little Rock, all of which had been issued by said city and used in the cancellation of a just and valid debt of said city, as hereinbefore stated, and which said bonds were issued prior to the ninth of April, 1869, which, with the interest due thereon, amounted to the sum of five hundred dollars, and the president of the city council, in exchange therefor, delivered to the plaintiff a bond of the city of
14 Little Rock therefor, a copy of which said bond is hereto attached, marked "I," and made a part hereof.

Said bond is one of a series of one hundred and fifty-nine, issued under the provisions of said ordinance.

That on the thirtieth of October, 1874, the president of the city council and the clerk of said city of Little reported, as was their duty, the issue

of the bond to the plaintiff for five hundred dollars, the same being bond No. 1, and one of the one hundred and fifty-nine bonds mentioned in said report made to the city council of said city, and the action of said president of the city council and the clerk of said city in issuing said bond was fully approved and confirmed by the city council of the said city of Little Rock, all of which will more fully appear from said ordinance, hereinbefore referred to, marked "B," and the report of said
15 officers, and the action of said city council, a copy of which is hereto attached marked "C," and made a part hereof.

Plaintiff states that it is the lawful owner and holder of said bond; the same is now due and unpaid; that demand for payment has been made on said defendant; that no portion thereof has been paid; that there is now due and unpaid thereon the sum of five hundred dollars, with interest thereon at the rate of ten per cent. per annum, according to the tenor and effect of said bond.

Copy of bond,

No. 1.] STATE OF ARKANSAS. [$500.

Bond of the City of Little Rock.

Know all men by these presents, that the city of Little Rock in the said State of Arkansas, acknowledges itself to owe and be indebted unto the Merchants' National Bank, or bearer, the sum of five hundred
16 dollars in lawful money of the United States of America, which sum the said city promises to pay, for value received, at the office of the treasurer of said city of Little Rock, one year from the date hereof, together with interest thereon, at the rate of ten per cent. per annum, until this bond shall be paid.

This bond is issued under and in pursuance of the provisions of section 3298, chapter 72, entitled "Incorporations," Gautt's Digest of the Statutes of Arkansas, and is for indebtedness of said city of Little Rock, incurred previous to the time of the passage of said act.

In testimony whereof the said City of Little Rock, by an ordinance of the council of said city, passed August 15, 1873, has caused this bond to be issued and signed by the president of said council and attested
17 by the clerk of said city, and to be sealed with his official seal.

Dated at Little Rock, in the county of Pulaski, State of Arkansas, this ninth day of October, 1874.

[SEAL.]

D. P. UPHAM,
President City Council.
C. M. BARNES,
City Clerk.

(On the margin:) One hundred dollars.

Bearing the following endorsement:

LITTLE ROCK $100 TEN PER CENT. CITY BOND.

AUDITOR'S OFFICE,
State of Arkansas.

I hereby certify that this bond is registered in my office according to law, that it is regularly and lawfully issued, and that the signatures thereto are genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of my office, at the city of Little Rock, this 22d day of October, A. D. 1874.

[SEAL.] J. R. BERRY,
Auditor of State.

18 There are 155 other counts of like nature.

For 157th cause of action plaintiff states:

That the city of Little Rock prior to the ninth of April, 1869, issued bonds of the denomination of one, two, five, ten, twenty, fifty, and one hundred dollars each, payable to bearer, with interest at the rate of eight per cent. per annum at maturity.

That all of said bonds were by order, and under the direction, sanction, and authority of the defendant, used, expended, and paid out at par value in the payment and taking up of warrants drawn on the defendant's treasurer by order of the city council of the city of Little Rock, to pay debts contracted by said city of Little Rock, in the purchase of sites for school-houses, the building of school-houses thereon, and
18 the support of schools therein; in the maint*ai*nance of a city police and a police court; in the maint*ai*nance of a board of health; in the maint*ai*nance of markets and market places; in the maint*ai*nance of wharves, levees and landing-places; in the providing of a supply of water for said city; in the maint*ai*nance of a fire department; in the improvement of streets and alleys; in the lighting of streets, alleys, and landing-places; in paying off and extending the time of payment of the past-due coupons of the bonded debt of said city; in the payment and in extending the time of payment of the maturing bonds of said city; and in the payment, and in extending the time of payment of debts due certain of its creditors who held the warrants of said city, drawn in their favor on the treasury of said defendant by order of the city council of said city of Little Rock, to whom said defendant was in-
debted for labor and service performed, and material and prop-
20 erty sold and delivered to said city at its request, and by it used in the execution of some one or more of its lawful and corporate powers.

That after the issue and use of said bonds as aforesaid, the defendant entertaining some doubt as to its power and authority to issue and use said bonds in the manner in which it had, and being anxious and desirous that the creditors of such city, and their assigns, who had surrendered a valid evidence of debt against said city, and received the bonds issued as aforesaid, therefor, should not be deprived of an amount justly due them by said city, by reason of a want of power on the part of said defendant to execute said bonds and use the same in redeeming and taking up the warrants of said city drawn on the treasurer thereof, said de-
fendant proposed to all persons holding said bonds, so issued and
21 used as aforesaid, that if they would surrender the same to said defendant, said defendant would as a matter of justice assume the payment of the debt evidenced by said bonds.

Plaintiff states that on the 9th of October, 1874, it was the holder and owner of fourteen thousand seven hundred and fifty-one dollars of the bonds of said city of Little Rock, so issued and used as aforesaid, and that all of said bonds were issued prior to April 9, 1869. That plaintiff was requested by the defendant to deliver to said defendant the bonds so held, issued, and used, as aforesaid, the defendant then and there offering to pay the plaintiff the full amount of the debt evidenced by

said bonds, twelve months from said day, with ten per cent. interest per annum until paid, in lawful money of the United States.

Plaintiff states that on the faith of this understanding and
22 agreement and to enable said city to take up what it regarded as a questionable evidence of debt which had been used and exchanged in the cancelling and taking up of the warrants of said city drawn on the treasurer thereof, and which were not paid unless the receipt of the bonds so issued as aforesaid should be held to be a payment, and to enable it to make proper recognition of valid, just, and unpaid debts, the evidence of which had been taken up and cancelled by the use of said bonds in the manner hereinbefore detailed, the plaintiff on said 9th day of October, 1874, delivered, surrendered, and turned over to said defendant of the bonds of the city of Little Rock the amount hereinbefore stated, and that all of said bonds were surrendered to said defendant without payment, and by the order and direction of the city council of said city burned and destroyed.

Plaintiff states that at the time of the surrender of the bonds
23 as aforesaid, the defendant then and there agreed and promised, inasmuch as said bonds only represented the amount of a valid, just, and unpaid debt of said defendant, the former evidence of which had been taken up by the treasurer of the defendant by the use of said bonds, to pay to plaintiff the sum of fourteen thousand seven hundred and fifty-one dollars in twelve months from the date thereof, with ten per cent. interest per annum, in lawful money of the United States.

Plaintiff states that no portion of said sum or the interest thereon has been paid. That there is justly due said plaintiff by reason of the promise aforesaid the sum of $14,751.00, with ten per cent. interest per annum from October 9, 1874.

There are 2 other counts of like nature, but for different amounts.

24 Plaintiff prays judgment against said defendant for the sum of twenty-one thousand and sixty dollars and twenty-two cents, with interest thereon at the rate of ten per cent. per annum from October 9th and 24th, 1874.

YONLEY & WHIPPLE,
WASSELL & MOORE, &
JOHN McCLURE,
Attorneys for Plaintiffs.

Which complaint, filed October 4, 1877, is as follows:

The plaintiff, The Merchants' National Bank of Little Rock, Arkansas, complains of the defendant, The City of Little Rock, and states:

1. That the City of Little Rock, the defendant herein, prior to the 1st of January, 1867, was, and at all times since said last-named day has been and now is, a municipal corporation and a body-politic with certain corporate powers, organized and existing as such under the
25 constitution and laws of the State of Arkansas, capable of sueing and be'sued.

2. That the plaintiff is a banking association, created by and under the laws of the United States, organized as such, pursuant to an act entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3rd, 1864, and acts supplementary thereto and amendatory thereof, and for first cause of action plaintiff states—

That the defendant, the said City of Little Rock, under the original act of said city, in force at the doing of the acts hereinafter detailed, was, among other things, *was* fully authorized and empowered by the charter of said city, and the public law of said State, in the execu-
26 tion of its corporate powers, to *to* contract and be contracted with, to purchase, build, establish, and maintain schools and school-houses, and purchase sites therefor; to establish and maintain a city police and police court, a board of health, markets and market-places, levees, wharves, docks, piers, and landing-places, and to purchase grounds for any of the purposes aforesaid; to provide a supply of water for said city, maintain a fire department; to open, widen, lay off, extend, straighten, and establish streets and alleys, and improve the same; to l*ike* streets and alleys, and landing-places; to open, construct, and keep in order sewers and drains; to borrow money on the credit of the city, and execute bonds for the payment of the same, and to pay any and all expenses and debts incurred in the execution of any or all of the foregoing powers; as well as for the payment of officers and persons employed by or serving said corporation

27 That the defendant, the said City of Little Rock, being authorized to borrow money on the credit of said city, and issue bonds for the payment thereof, did, in the month of January, 1867, and at divers dates from *from* that time down to the 1st of April, 1869, order, direct, and authorize that the bonds of said City of Little Rock, the defendant herein, to the amount of fifty thousand dollars, be issued for the purpose of enabling said city to establish a system of free common schools, and in the further sum of fifty thousand dollars to be expended as the wisdom of the city council of said City of Little Rock might thereafter direct, in the lawful execution of some one or more of its corporate powers, all of which will more fully appear by the record of the proceedings of the city council of said City of Little Rock, a copy
28 of which, so far as the same relates to this subject, is hereto attached and made a part hereof, marked "A."

That the defendant, the said City of Little Rock, in the execution of the order referred to in the preceding paragraph in relation to the issue of bonds for the object and purposes therein detailed, caused the same to be executed as follows:

9300	bonds	of	the	denomination	of	.....	$1 00
9000	"	"	"	"	"	.....	$2 00
7000	"	"	"	"	"	.....	$5 00
3000	"	"	"	"	"	.....	$10 00
100	"	"	"	"	"	.....	$20 00
2	"	"	"	"	"	.....	$50 00
1	"	"	"	"	"	.....	$100 00

That all of said bonds so issued as aforesaid were made payable to bearer, from one to ten years after the date thereof, with eight per cent. interest per annum, at maturity, and by the terms of a resolution of said city council of said City of Little Rock, were to be receivable in
29 payment of all dues to said city, and by an act of the general assembly of said State, passed after the issue of said bonds, were made receivable for all taxes and debts due said city except interest-tax.

Plaintiff states that all of said bonds were by order, and under the direction, sanction, and authority of the defendant, the said City of Little Rock, expended and used at par value in the payment and satisfaction

of debts contracted by said City of Little Rock in the purchase of sites for school-houses for said city, the building of school-houses thereon, and the support of schools therein; in paying off and extending the time of payment of the past-due interest coupons of the bonded debt of said city; in the payment and in extending the time of payment of the maturing bonds of said city, and other obligations thereof which had been lawfully contracted by said city; and in the payment of
30 debts and in extending the time of payments of the debts of said city, of such of its creditors who were willing to accept said bonds and surrender warrants drawn in their favor by the officers and authority of said city in satisfaction and liquidation of debts due them, and to whom said city was justly indebted for labor and services performed, and material and property sold and delivered to said city, and by it used in the execution of some one or more of its lawful corporate powers.

That all of said bonds so paid out by the defendant as aforesaid, in the hands of those receiving the same, and their assigns, represented the whole or some portion of an unpaid debt of the City of Little Rock, which had been evidenced by a warrant lawfully and legally issued by said defendant in the execution of one or more of its lawful and corporate powers, to some person or persons named therein, for an
31 amount found due such person or persons, for labor and services rendered said city, or material and property furnished the same at its request, which said warrant had been surrendered to said defendant's treasurer on the reception from said treasurer of the bonds of the City of Little Rock, so issued as aforesaid, or were received by persons in extending the time of payment of a just and valid debt against said city, which was and theretofore had been evidenced by proper and lawful acknowledgment thereof, which had become due, and which said proper acknowledgment of debt was surrendered to said treasurer of said defendant, and taken up and cancelled under the authority and direction of said defendant, by delivery of the bonds aforesaid in satisfaction of said warrant or warrants, and that said bonds represent no other contract or consideration whatever.

32 Plaintiff states that between the time of the issue of the bonds as aforesaid by said City of Little Rock, and the third day of November, 1874, in the ordinary course of its business, it made quite a number of loans and discounts to various persons. That many of the loans and discounts were originally secured, in addition to personal security, by deposit, as collateral, of the warrants of the City of Little Rock, drawn by order of the city council thereof on the treasurer of said city, which said warrants so deposited as collateral as aforesaid the plaintiff, for its own protection, has been compelled to buy. That the warrants so procured have, on various occasions, been presented to the defendant's treasurer for payment. That the defendant's treasurer, in payment and satisfaction of said warrants, paid and delivered to the plaintiff the bonds of the City of Little Rock so issued in the manner and under the circumstances and for the object and purposes
33 hereinbefore set forth. That in other instances, to save itself from loss by reason of loans and discounts made, it has received the bonds of said city so issued as aforesaid, which had been paid out to other parties in taking up and cancelling lawful and legal warrants, drawn on the treasurer of said City of Little Rock, by order of the city council thereof, for the payment of a just and lawful debt which said city had the right to contract, and which said city did contract.

That after the issue and delivery of said bonds as aforesaid, said City

of Little Rock, entertaining some doubt as to its authority and power to issue and pay out said bonds, and being anxious and desirous that the creditors of said city should not be deprived of such amounts as might be due them for money advanced, labor performed, material fur-
34 nished, and evidences of debt canceled and surrendered for said bonds, and scorning to take any advantage of such of its creditors or assigns as had received said bonds, at par, in payment of just and lawful debts, which said debts were, prior to that time, evidenced by a warrant legally issued to pay some person or persons therein named, for some liability or debt which said city had the lawful power to contract, and which it had contracted, proposed by ordinance that if the persons who held the bonds of said city, so issued and delivered as aforesaid, would surrender the same to said city for cancellation and destruction, said defendant would give to the person or persons surrendering the same an acknowledgment of debt therefor, on the ledger of said city, for the full amount of the principal of said bonds, and the interest thereon, up to the date of surrendering the same, and that
35 said ledger credit and account should thereafter draw interest at the rate of eight per cent. per annum until paid, and that the person who thus stood accredited on the ledger of said city might have the privilege of checking or drawing against said account.

That on the second day of November, 1874, the plaintiff, in accordance with the proposition of said city, to give to the holders of said bonds a credit on the ledger of said city for the full amount of the principal of the bonds and the accumulated interest, &c., presented and delivered to the clerk of said city, as directed by said ordinance, a copy of which is hereto attached marked, and made a part hereof, an amount of bonds, which, including the matured interest thereon, amounted to seven thousand eight hundred and ten dollars and thirty-two cents ($7,810.32).

36 That said bonds so surrendered as aforesaid were, by the order of said City of Little Rock, the defendant herein, credited in account on the ledger of said defendant, in the sum aforesaid, and the same ordered paid by the city council thereof.

Plaintiff states that there is now due from the defendant to the plaintiff, by reason of the acts and promises aforesaid, the sum of seven thousand eight hundred and ten dollars and thirty-two cents, with interest at the rate of eight per cent. per annum; that demand for payment has been made on said defendant; that no portion thereof has been paid, and that there is now justly due from the defendant to the plaintiff $7,810.32, with interest thereon at the rate of eight per cent. per annum.

There is one other count of like nature.

37 Plaintiff prays judgment for eight thousand three hundred and five dollars and twenty-one cents ($8,305.21), with interest from the dates aforesaid as herein stated, and for other relief.

McCLURE,
For Pl'ff.

Which exhibits to complaints are as follows:

COUNCIL CHAMBER, LITTLE ROCK,
Tuesday Evening, January 15th, 1867.

Council met pursuant to adjournment; present, Hopkins, mayor, and

Alderman Peay, Krebs, Wassell, Weeks, George, Hagur, Donohue, and Hooper.

On motion of Alderman Weeks that the city issue $200,000 in bonds, at 8 per cent. interest, redeemable in four, six, eight, and ten years, was referred to the finance committee.

38 COUNCIL CHAMBER, LITTLE ROCK,
Tuesday Evening, January 22d, 1867.

Council met pursuant to adjournment. Present, Hopkins, mayor, and aldermen Peay, Wassell, Donahue, Krebs, Hooper, George, and Weeks.

His hon. the mayor presented the following message, which, on motion of Alderman Hooper, was received and spread on the minutes:

To the honorable city council of the city of Little Rock:

GENTLEMEN: You will, I trust, pardon me for submitting to your careful consideration a few thoughts and conclusions, to which I have come, on an impartial review of the real situation of our people within our city, so far as relates to their prospects of being able to pay anything like the requisite amount of taxes in the present year to run successfully our city government, and to keep up the requisite amount
39 of improvements on our streets, alleys, bridges, sewers, gutters, &'., &'., &'.

Allow me to submit to you the opinion that our people, as a whole, will not own, control, and handle this year, in cash, more than half the amount of money that they did control last year, and unless the people have money it will be hard for them to pay. It is true, I grant, that the money raised and expended goes into the hands of our people for labor, material, etc., to keep up the improvements in our city, but finally it returns to the produce and other merchants, and by them is sent beyond the reach of the city laborer, for other supplies as a necessity, and the thing to my mind most to be feared is the great amount of money that must be sent out from our city to bring supplies, without which our people cannot subsist; and the known fact that our country patrons, from whom the money is usually obtained to fill the
40 vacuum, will perhaps be less able this than last or any other year for many to give our merchants and tradesmen the required amount of cash patronage to enable them to pay liberal rents, licenses, and tax. It seems to me a question well worthy of the most mature consideration of the council, for I know you all and can say confidently for each of you that you will in every instance do what your convictions say is for the best interest of the city; and I doubt not that you all concur with me in the opinion that it would be bad policy to so oppress any class of ordinary business pursuits in our city as to make it leave with its capital and influence.

The two vital points that need most of your thought are, first, to determine a just and equal mode *to* taxation to be governed by, and at a rate that at the present, under all surrounding circumstances, may seem just to our people.

41 The second and most important consideration is to adopt some means of bringing from abroad money in the season to fill the vacuum in our midst occasioned by the continuous outgoing for supplies, taxes, stamps, and other causes.

It seems that when a city or an individual is poor it is the time he should uis his credit, if ever, and a city may be excused at least for using

her credit for making public improvements for the use of the present and coming generations to enjoy.

All of which, without desiring to change the minds or actions of any member of your honorable body on any subject, is respectfully submitted.

J. W. HOPKINS,
Mayor.

Alderman Wassell offered the report of finance committee in regard to create $100,000 in bonds; which on motion of Alderman Weeks, was adopted and ordered to be spread on the minutes; ayes,
42 alderman Hooper, George, Wassell, Weeks, Hagar, Donahue, Krebs, and Peay, the mayor declining to vote.

Report reads as follows:

Report of finance committee.

The committee on finance, to whom was referred the subject of the city issuing two hundred thousand dollars in city bonds, desire to make the following as their unanimous report:

As the subject of issuing bonds and the purpose for which they are to be issued are in themselves different questions, the committee propose to treat the subject under two different heads.

We are admonished by the fact that the city bonds heretofore issued have not been provided for, and that to issue new bonds with no certainty of paying the accruing interest and the principal at maturity would be ruinous and unfortunate in the extreme. Other cities
43 of less population and wealth have done what the committee propose to do, and have succeeded in their efforts, and why not the city of Little Rock? Have we not the intelligence to create and industry to direct the proper application of the proceeds of the proposed bonds? If we have not those requisites, then poor and sad is our condition indeed.

The purpose of the bonds will be our next enquiry. And there we are met, if not with reproach, at least with serious regrets, in having to make a faithful, candid statement of our present condition.

Little Rock, a city for over thirty years the capital of the State, is without a public school free to all her citizens, rich or poor. Our poor children, uneducated, are permitted, nay compelled, to grow up in ignorance and all its attendant evils, candidates for a life of toil, uselessness, and all its train of evil consequences, and at death the poor con-
44 solation that their lives have been in great part a blank, owing to the fact that they were raised in the city of Little Rock without education and its blessings.

The committee are not unmindful of the fact that complaints will be made against them by a part of the present population of this city. Yet they prefer to be spoken well of by an educated, intelligent set of young men at a future day, than the empty applause of the present. They know they are advocating the cause of that class of their fellow-citizens that are not of that age to plead their own cause, to insist upon their own rights. It will be no excuse for the committee to say that because former councils of the city have failed to do their duty to the class of citizens referred to, that the present council shall follow them in their unfortunate and much to be regretted course.

Children will be raised in our midst, and the question at once

45 presents itself, shall they be raised in ignorance, without education or proper training? Shall they be an ornament to the city that gave them birth, and in whose limits they should have spent the most interesting portion of their lives; or shall they be regarded as outcasts, unworthy of our attention, and treated as in a land of heathenish? The latter conclusion the committee can never arrive at.

The committee therefore respectfully recommend that at once the sum of fifty thousand dollars in city bonds be issued for the purpose of inaugurating to us a new and too long delayed public enterprise—a system of common schools; and a further sum of fifty thousand dollars to be expended as the wisdom and orders of council shall direct.

All of which is respectfully submitted.

WASSELL,
Chairman.

46 On motion of M'r Weeks the interest on the bonds of the city to be issued was fixed at 8 per cent. per annum.

A special committee was appointed for taking the necessary steps in regard issuing said bonds. Hooper, Wassell, and Weeks, committee.

COUNCIL CHAMBER, LITTLE ROCK,
Tuesday Evening, May 21st, 1867.

Council met pursuant to adjournment. Present, Mayor Hopkins, and Aldermen Wassell, Hager, McAlmont, Weeks, Krebs, George, and Henry.

Alderman Henry offered the following resolutions:

Resolved, That the bonds issued by the city shall be received for all the city dues of whatever kind.

Adopted.

Resolved, That the city bonds, in blank, shall be placed in custody and keeping of the finance committee, and no bonds shall be
47 issued for any purpose only by resolution of this council.

Adopted.

COUNCIL CHAMBER, LITTLE ROCK,
Friday Evening, August 15th, 1873.

The council met in regular session. Present, Messrs. Moore, Cunningham, Scott, Lewis, Gibb, and the president.

M'r Gibb presented an ordinance entitled "An ordinance to provide for the redemption of outstanding city bonds on bank note paper," which was read a first time.

On motion of M'r Lewis the rules were suspended and ordinance placed on second reading, *reading.* Yeas, 6; nays, none.

Those voting in affirmative are, Messrs. Moore, Cunningham, Scott, Lewis, Gibb, and the president.

None voting in the negative.

So the ordinance was read a second time.

M'r Lewis moved that rules be further suspended, the ordinance
48 read a third time by title and placed upon its final passage, which was agreed. Yeas, 6; nays, none.

Those voting in the affirmative are Messrs. Moore Cunningham, Scott, Lewis, Gibb, and the president. None voting in the negative.

The ordinance was then read a third time by title.

The question being then put, Shall the ordinance pass? It was agreed to. Yeas, 6; nays, none. Those voting affirmatively are Messrs. Moore, Cunningham, Scott, Lewis, Gibb, and the president.

B.

Ordinance No. 102.

An ordinance to provide for the redemption of outstanding city bonds on bank note paper:

Whereas the city of Little Rock has heretofore issued her bonds in the form of bank notes for circulation as currency, and

Whereas a large amount of the same are long past due, bearing four to five years' interest, many of which are badly worn, and

49 Whereas it is desirable to lessen the circulation of said bonds, and

Whereas no provision having been heretofore made for the redemption of any portion of said bonds, and the redemption of all of said bonds at any one time would be burdensome to the taxpayers of the city of Little Rock. Therefore,

SECTION 1. Be it ordained by the city council of the city of Little Rock, that whenever the holder of any such bonds heretofore issued on bank-note paper, for the purpose of circulation as currency, shall present the same to the president of the council, and shall so request, it shall be, and is hereby made the duty of the president of the council, on the surrender of said bonds, in any sum not less than fifty dollars, to issue to the owner or holder thereof certificates or bonds of indebtedness of said city, in lieu of said bonds, with interest due thereon, such certificate or bond to bear interest at the rate of ten per centum

50 per annum, to be signed by the president of the council and attested by the clerk, with his seal of office, and payable at the times and in the manner following, to wit: Twelve months from the date of said certificates or bonds, out of any money in the treasury not otherwise appropriated, and each and every certificate or bond so issued under the provisions of this ordinance shall be receivable by the collector, who is hereby required to receive the same for any general tax levied by the city. The bonds so surrendered shall be deposited in the office of the clerk, and it shall be his duty to keep a record of the amount redeemed, as herein provided, showing the amount of principal and interest; and he shall also keep a seperate list and record of the certificates or bonds issued, to whom, their number, amount, and when due. He shall also, at the first regular meeting of the council in each month,

51 make a full report of bonds surrendered and certificates or bonds issued under this ordinance, and deliver to the finance committee the bonds for destruction, in the same manner as provided for destroying mutilated currency: Provided, however, that not more than fifty thousand dollars shall be issued in certificates or bonds under the provisions of this ordinance, to become due and payable in any one year.

SECTION II. This ordinance shall be in force and effect from and after its passage and publication.

Passed, Little Rock, Aug. 15th, 1873.

D. P. UPHAM,
President of City Council.

City clerk.

C.

LITTLE ROCK, *Oct.* 30, 1874.

The council met in regular session. Present, Messrs. Cunningham, Gibb, Scott, Lewis, Moore, Weeks, and the president.

52 The president of the council and the city clerk reported—

That in pursuance of the provisions of ordinance No. 102, passed Aug. 15th, 1873, they have executed bonds of the city of Little Rock, payable one year from date, and bearing interest at the rate of ten per centum per annum, numbered from 1 to 159 inclusive, amounting to the sum of twenty-one thousand three hundred and thirty-one and $\frac{33}{100}$ dollars, for which they have received old city bonds on bank-note paper, amounting, together with accrued interest, to the same sum, which they have turned over to the finance committee for destruction.

That the bonds issued are registered on book called fund ledger, immediately following the registry of certificates issued on general fund, and the form of bond adopted was first submitted to the special
53 city attorneys, Messrs. Youley and Whipple, and approved by them.

On motion of M'r Gibb the report was received and action approved.

I certify the above to be true and correct extracts from the records of the proceedings of the city council, as appear in record C, pages 174, 175, 176, 179, 180, 207, and 208; record E, pages 129, 133, 134, 466, and 467; record of ordinances, pages 229 and 230. In witness whereof I have hereunto set my hand and seal of office this 13th day of August, A. D. 1877.

[SEAL.] CHARLES E. KIDDER,
City Clerk.

COUNCIL CHAMBER, LITTLE ROCK,
Friday Evening, Aug. 7, 1874.

The council met in regular session, Hon. D. P. Upham presiding
54 Present, Cunningham, Scott, Moore, Gibb, Lewis, Weeks, and the president.

Resolved, That the city clerk is hereby authorized and directed to accept orders drawn by creditors of the city having open accounts, where said accounts have been audited and allowed by the city council and placed to their credit on the ledger, and no certificate issued for the same, and may charge the amount of such orders to the proper accounts, and place them to the credit of the parties in whose favor they are drawn.

Resolved, further, That the clerk and collector are authorized to receive such orders in payment for license, dues, or cemetery lots, and the same shall be cancelled and charged up in like manner as if it were city indebtedness.

LITTLE ROCK, *Oct.* 30, 1874.

The council met in regular session. Present, Cunningham,
55, 56 Scott, Moore, Gibb, Lewis, Weeks, and the president.

Your committee further report that they are informed that there is a considerable amount of city money which the holders are willing and offer to turn over to the city authorities to be cancelled and destroyed, if proper evidence and statement of the amount surrendered be furnished them by the city authorities, and your committee therefore recommend the adoption of the accompanying resolution, to wit:

Whereas it is desirable to reduce the amount of city money outstanding in every possible manner when the same can be legally done, and in such a way that will be fair and just, both to the city and holder of such money; and

Whereas the finance committee has reported that there is a con-

57 siderable amount of such city money which the holders are willing and offer to turn over to the city authorities for cancellation and destruction if proper evidence of the statement of the amounts thus surrendered be furnished them by the city authorities: Therefore be it

Resolved, That whenever city bonds or certificates of indebtedness on bank-note paper are presented to the city clerk in any sum not less than fifty dollars, it shall be the duty of the city clerk to receive, cancel, and record the same, and turn the same over to the committee on finance, who shall destroy the same in the manner in which other cancelled city money is destroyed by them, and report their action in regard to the same to the council, and it shall be the duty of city clerk to report to this council at the first regular meeting in each month the amount
58 thus received by him and from whom received; and he shall place the amount of the same to the credit of the party or parties from whom received on the ledger of the city, and such credit thus placed upon the ledger shall be so stated as to show the amount of the principal and interest accrued, if any, and rate of interest seperately, and the said amount of interest shall continue to draw interest at the rate as it draws when surrendered for cancellation; and it shall further be the duty of the city clerk, whenever desired by the party to whom credit is thus given on the ledger, to make out and deliver to him an official statement of the amount thus due him, such statement to show the amount of the principal, rate of interest, and the interest accrued at the date of such credit so given to him.

On motion of M'r Weeks the report and resolution was adopted.

59 COUNCIL CHAMBER, LITTLE ROCK,
Friday Evening, November 6, 1874.

The council met in regular session, Hon. D. P. Upham presiding. Present, Cunningham, Scott, Moore, Gibb, Lewis, Weeks, and the president.

The city clerk reported that in accordance with resolution adopted at last meeting he has received the following specified amounts of city money, which amounts are placed to the credit of the various parties from whom received, as directed by said resolution, to wit:

From Merchants' National Bank, principal and interest, $7,810.32.

The financial committee submitted the following report, to wit:

Your committee on finance ask leave to report that we have de-
60 stroyed in the usual manner the sum of 13,432.52 in cancelled city securities, as reported at the last meeting. We have also received and destroyed the following specified amounts received from various parties under the resolution adopted at the last meeting, to wit: From Merchants' National Bank $7,810.32 city bonds, with interest thereon, and we recommend that said amounts be placed to the credit of the parties from whom received, as provided in said resolution, and that the same be paid whenever there is any money in the treasury not otherwise appropriated.

On motion of M'r Weeks the report was adopted.

Merchants' National Bank. Cr. Nov. 2, 1874.

Principal bears interest at the rate of 8 per cent. per annum.

By city money turned over (resolution Oct. 30):

61	Principal	$6,441 00
	Int. on above to date	1,369 32
		$7,810 32
July 27.	Int. to Aug. 1st, 1875	385 02
		$8,195 34

M'ch 26, '75.	By city money turned over (resolution Oct. 30):	
Principal		$400 00
Int. on above to date		94 89
		494 89
Aug. 5, 1875.	Int. to Aug. 5, 1875	11 02
		$505 91

62 *Record entry.—October term*, 1877.

And on November 7, 1877, as follows:

Comes Henry M. Cooper, by John McClure, Youley & Whipple, and Wassell and Moore, his attorneys, and files herein his motion to be made a party defendant, and also files his answer, which answer is as follows:

Now comes Henry M. Cooper, leave of the court first being had and obtained by Youley & Whipple, Wassell and Moore, and John McClure, his attorneys, and states—

That he was the owner and holder of bonds Nos. 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, & 110, which are made and constitute the causes of action in the plaintiff' complaint numbered 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, and 159.

63 That long before the commencement of this suit he sold, assigned, and transferred to the plaintiff herein for value the said bonds numbered 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, & 110, and in the sale and delivery thereof intended to, and did, transfer and assign to the plaintiff all right, title, claim, and interest to said bonds and to the original consideration for which said bonds were given.

That said assignment, sale, and transfer of said bonds to the plaintiff was intended to transfer to the plaintiff any and rights or causes of action against the defendant which he himself might have sustained and prosecuted, and that any and all determination of questions between the plaintiff and the city of Little Rock should be conclusive of all rights and claims which he may have had arising out the consideration for which said bonds were issued.

64 Said Cooper further states that he now and here enters a disclaimer of right to bring an action against said city of Little Rock, and consents that a determination of the questions and matter now at issue between the plaintiff and said city of Little Rock, growing out of the causes of action set forth in said complaint, shall bar and estop him of any and all right to recover any sum or sums from said

city, the consideration of which grows out of the matters set forth in the complaint herein.

YOULEY & WHIPPLE,
WASSELL & MOORE, &
JOHN McCLURE,
For Henry M. Cooper.

And on November 13, 1878, as follows:

Comes the defendant, by Ben. S. Johnson, esq., its attorney, and files herein its additional answer, and comes the plaintiff, by John
65 McClure, esq., her attorney, and having amended her complaint as to the cause of action set out in the 159th paragraph of her complaint by bringing in the required party, it is ordered that the demurrer to said paragraph 159 of the complaint be overruled.

And on February 13, 1878, as follows:

On this day came the defendant, by B. S. Johnson and N. M. Rose, her attorneys, and also came plaintiff, by McClure, Youley and Whipple, her attorneys, and the motion to consolidate this cause
66 with No. 1612 on the docket between the same parties is now submitted to the court; and the premises being duly considered, it is now ordered that the said two causes be, and the same are, consolidated; and it is ordered that hereafter said two causes proceed as one suit, and defendant has leave to withdraw her answers herein, and to file new answers going to the causes of action set up in said consolidated suit.

Record entry.—April term, 1878.

And on April 8, 1878, as follows:

Comes the defendant, by N. M. Rose and B. S. Johnson, its attorneys, and files herein its substituted answer, which answer is as follows:

Comes the defendant, and for substituted answer to the consolidated complaint herein, says:

67 1. That as to the allegation made in the said complaints, that the plaintiff received the said warrants, bonds, and other supposed evidences of debt as collateral security for loans, or in payment of loans and discounts made by the plaintiff, and not otherwise, this defendant says that it has no knowledge and has no information thereof sufficient to found a belief upon.

That all the bonds and other covenants sued on herein were made in consideration of the surrender to the defendant of certain bonds and certificates of indebtedness issued by the officers of the defendant in her name, purporting that money would be paid to the receiver, holder, or bearer thereof, with the intention that the same should be used as a currency or medium of trade, in lieu of money, not only without
68 any authority of law, but contrary to the statute in such case made and provided, and upon no other consideration whatever.

2. That the city of Little Rock never at any time authorized the execution, making, or issuing of the said bonds and other covenants, or any or either of them.

3. That the said pretended account sued on herein was created in lieu of certain pretended bonds, referred to in paragraph 1 of this answer, which purported to be the bonds and evidences of debt of this defendant, the ledger account sued on herein being created for the purpose

of taking up the said former bonds and evidences of debt, and being created in lieu thereof, and that creation of the ledger account sued on herein was illegal, and without authority of law

Because the new bonds thus issued increased the indebtedness
69 of the city and did not extend the time of payment of the former debts, supposing the said former bonds and evidences of debt to have been valid, and therefore to have been a valuable consideration for the ledger account sued on herein; wherefore defendant says that the account sued on herein is void.

4. There was never any ordinance or other corporate act by the defendant authorizing the issue of the said bonds and certificates of indebtedness for which the accounts sued on were issued, and that the accounts sued on were made for no other consideration than the surrender by the plaintiff of certain bonds and certificates of indebtedness purporting to have been issued by the defendant, but without any ordinance or other corporate act authorizing the same.

70 5. That the accounts sued on herein were created in consideration of the surrender, by the plaintiff and others, of certain bonds or evidences of debt previously issued by certain officers of the defendant, purporting to bind her; and that said former bonds and evidences of debt were not issued for any loan, but only for appropriations of money, and that when the said appropriations were made there was not in the treasury of the defendant money unappropriated sufficient to pay the said appropriations or either of them, so that the said appropriations were void, and the said evidences of debt issued on the same were void, and that the surrender of the said evidences of debt were the only consideration for the bonds sued on herein.

6. That there was no legal consideration for the creation of the accounts sued on herein; that the same were created only on the
71 consideration set forth in paragraph 1 of this answer; and that if the plaintiff could be supposed to be equitable assignee of any claim or demand in settlement of which the said original bonds or certificates of indebtedness were issued, then the cause of action of the plaintiff has not accrued at any time within three years next before the commencement of this suit.

7. That as to the supposed causes of action in said complaints mentioned, purporting to be based on the surrender by the plaintiff and others of certain bonds and other evidences of debt of said defendant, and on a general promise to pay the amount thereof, and not specifically on the issue of any bonds in lieu thereof, this defendant says that the evidences of debt thus surrendered were certain bonds and certificates of indebtedness issued by the officers of the defendant in her name, pur-
72 porting that money would be paid to the receiver, holder, or bearer thereof, with the intention that the same should be used as a currency or medium of trade in lieu of money, not only without authority of law, but contrary to the statute in such case made and provided, and upon no other consideration whatever; and that this defendant did not, and her officers could not, bind her to pay the amount thereof, and that the said promises mentioned in the said complaint are null and void.

8. That as to the supposed causes of action referred to in paragraph 7 of this answer the defendant says that she never authorized the execution, making, or issuing of the said supposed evidences of debt which are alleged to have been surrendered as a consideration for the promises sued on herein.

11. That as to the said supposed causes of action referred to said

73 paragraph 7 of this answer the defendant says that the said supposed evidences of debt alleged in the said complaint to have been surrendered to the defendant were issued without any ordinance or other corporate act of the defendant.

12. That as to the said supposed causes of action referred to in paragraph 7 of this answer the defendant says that the said supposed evidences of debt said to have been surrendered to the defendant were not issued for any loan, but only for appropriations of money, and that when the said appropriations were made there was not in the treasury of the defendant money unappropriated sufficient to pay the said appropriations, or either of them, so that the said appropriations were void, and that the said evidences of debt were also void; and that there was no other consideration for the making of the said supposed promises.

74 13. That as to the said supposed causes of action referred to in paragraph 7 of this answer the plaintiff's cause of action hath not accrued at any time within three years next before the commencement of this suit.

14. That as to the supposed causes of action referred to in paragraph 7 of this answer the defendant says that she did not promise in manner and form as the plaintiff hath thereof above alleged against her.

15. And as to all the causes of action in the said complaints mentioned the defendant says that the said supposed promises and covenants were made without authority of law, and without any corporate act of this defendant, and without any legal consideration.

And of all these defences the defendant puts itself upon the country.

75 B. S. JOHNSON.
N. M. ROSE.

And on April 23, 1878, as follows:

Comes the plaintiff by John McClure, Youley & Whipple, and Wassell and Moore, esqs., its attorneys, and both parties announcing themselves ready for trial, a jury came, to wit, John A. Frith, C. W. Fry, J. W. Harper, M. W. Izard, D. C. Montgomery, W. T. Poe, D. W.
76 Ward, L. G. Williams, John Ritchie, Bernard Murray, W. T. Wilson, and James R. Young, being twelve good and lawful men of the district, who were duly tried, empanelled, and sworn well and truly to try the issues joined between the plaintiff and defendant, and a true verdict give according to the law and the evidence, and thereupon the jury proceed to hear the evidence, and the trial hereof not being concluded, the same is continued until to-morrow morning.

And on April 24, 1878, as follows:

Comes the plaintiff by John McClure, Youley & Whipple, and Wassel and Moore, esq's, its attorneys, and comes the defendant by N. M. Rose and B. S. Johnson, esq's, its attorneys, and come the jury, to wit, John A. Frith, C. W. Fry, J. W. Harper, M. W. Izard, D. C. Montgomery, W. T. Poe, D. W. Ward, L. G. Williams, John Ritchie, Ber-
77 nard Murray, W. T. Wilson, and James R. Young, and the trial hereof not being concluded on yesterday the same is resumed, and the trial hereof not being concluded the same is continued until to-morrow morning.

And on April 25, 1878, as follows:

Comes the plaintiff by John McClure, Youley & Whipple, and Was-

sel and Moore, esq's, its attorneys, and come the jury, to wit, John A. Frith, C. W. Fry, J. W. Harper, M. W. Izard, D. C. Montgomery, W. T. Poe, D. W. Ward, L. G. Williams, John Ritchie, Bernard Murray, W. T. Wilson, and James R. Young, and the trial hereof not being concluded on yesterday the same is now resumed, and the trial hereof not being concluded the same is continued until to-morrow morning.

And on April 26, 1878, as follows:

Comes the plaintiff by John McClure, Youley and Whipple,
78 and Wassell and Moore, esq's, its attorneys, and comes the defendant by N. M. Rose and B. S. Johnson, esq's, its attorneys, and come the jury, to wit, John A. Frith, C. W. Fry, J. W. Harper, M. W. Izard, D. C. Montgomery, W. T. Poe, D. W. Ward, L. G. Williams, John Ritchie, Bernard Murray, W. T. Wilson, and James R. Young, and the trial hereof not being concluded on yesterday the same is now resumed, and the jury having heard all the evidence, and having been charged and instructed by the court, returned into court the following verdict:

We, the jury, find the issues for the plaintiff, and assess its damages at the sum of thirty-eight thousand six hundred and forty dollars and forty cents.

W. T. POE, *Foreman.*

It is therefore considered, ordered, and adjudged that said plaintiff do have and recover of and from said defendant the sum of thirty-
79 eight thousand six hundred and forty dollars and forty cents (38,640.40) for its damages found as aforesaid, with interest on twenty-eight thousand five hundred and twelve dollars and sixteen cents, a portion of said damages, at the rate *rate* of ten per centum per annum, together with all its costs in and about this suit expended; and during the trial of this cause the defendant excepted to divers rulings of the court, and to save her exceptions asked and obtained leave to file her bill of exceptions at any time during the present term of this court.

And on April 30, 1878, as follows:

On this day came the plaintiff, by Yonley & Whipple, John McClure, and Wassell and Moore, esqs., her attorneys, and the defendant came by N. M. Rose and B. S. Johnson, her attorneys, and on the motion of the defendant it is now ordered by the court that in making out
80 the transcript for the Supreme Court in this cause the clerk attach to the bill of exceptions one of the Little Rock City bonds, printed on bank-note paper, introduced in evidence by the defendant, and now deposited with the clerk, and by consent of parties it is further ordered that the clerk in making out the said transcript omit all writs and returns, and that in copying the complaints the clerk copy one paragraph on a bond, and then omit all other paragraphs on like bonds, merely making a minute of the number of like paragraphs, and that he do the same with the paragraphs on the common counts, there being no question raised as to the specific amount of the judgment, but only as to the principles of law on which the judgment is founded.

In order further to disencumber the record of immaterial mat-
81 ter, the defendant asks and obtains leave to withdraw from the files the original answers, which is accordingly done. In like manner the defendant withdraws from the files an additional answer, a demurrer to the complaint, a motion to compel the plaintiff to elect, and bill of exceptions filed November 3, 1877.

And on May 9, 1878, as follows:

On this day came the defendant, by N. M. Rose and B. S. Johnson, her attorneys, and on her motion her bill of exceptions is filed herein, and it is ordered to be made a part of the record in this cause.

Which bill of exceptions is in the words and figures following, to wit:

Be it remembered that on the trial of this cause, the plaintiff,
82 after having the complaint and exhibits read to the jury, the bonds sued upon, which correspond with the allegations of the complaint, the defendant objected to the reading of the bonds because there was no ordinance authorizing their issue, and excepted to the ruling of the court permitting the bonds to be read.

The plaintiff also read copies of various ordinances of the city council of the defendant, and other reports and papers connected therewith, which are as follows:

Ordinance No. 27.

An ordinance to call in the outstanding warrants, scrips, or other evidences of indebtedness.

Be it ordained by the city council of Little Rock:

SECTION 1. In pursuance of an act of the legislature of the State of Arkansas, entitled "An act to authorize counties, cities, and in-
83 corporated towns to call in their outstanding warrants, scrip, or other evidences of indebtedness, for cancellation and reissue," approved February 27th, 1875,

SECTION 2. All holders of scrips, bonds, warrants, certificates of indebtedness, orders, or any other evidence of indebtedness whatsoever of the city of Little Rock, are hereby required, on or before the 5th day of August, 1875, to present the same to the common council of the city of Little Rock for cancellation and reissue.

SECTION 3. All persons holding any such evidence of indebtedness who shall neglect or refuse to present the same, as hereby required, shall hereafter be forever barred from deriving any benefit from their claims.

SECTION 4. It shall be, and is hereby, made the duty of the city clerk to furnish the chief of police with a true copy of this ordinance within ten (10) days after the passage thereof, whereupon it shall be the duty of said chief of police to notify the holders of said indebtedness
84 and claims to present the same to said common council on or before the said 5th day of August, 1875, for cancellation and reissue, by putting up at the door of the common council room of said city at least thirty (30) days before the fifth (5th) day of August, 1875, a true copy of this ordinance, and by publishing the same in the Arkansas Daily Gazette and in the Arkansas Weekly Gazette for two (2) weeks in succession, the publication to be at least thirty (30) days before the said fifth (5') day of August, 1875.

SECTION 5. That this ordinance be in force from and after its passage.

(Signed) JOHN G. FLETCHER,
President City Council.

Passed April 29, 1875.

Attest: (Signed) LOUIS RAU,
City Clerk.

85 *Extract from record of city indebtedness, filed for cancellation and reissue, under ordinance No. 27, passed April 29, 1875.*

Date.	Number.	From whom received.	For what purpose.	Interest.	Open ℔.	Little Rock 10% bonds.	Total.
*	*	*	*	*	*	*	*
1875.							
July 27	204	M'ch'ts' Nat. Bank...	L. R. bon's, 10%, Nos. 1 to 12 incl.	.....	.....	7,000 00	.....
" "	"	" " "	" " " " 15 to 84, incl.	.....	.....	7,000 00	.....
" "	"	" " "	" " " " 111 to 156, incl	.....	.....	4,589 64	1,859 64
*	*	*	*	*	*	*	*
Aug. 5	323	Henry M. Cooper	L. R. bonds, 10%, Nos. 87 to 91, incl.	.....	.....	500 00	.....
" "	"	" " "	" " " " 103 to 110	.....	.....	719 58	1,219 58
*	*	*	*	*	*	*	*
Aug. 18	368	Henry M. Cooper....	L R. bonds, 10%, Nos. 85 & 86.	.....	.....	200 00	
" "	"	" " "	" " " " 92 to 102, incl.	.....	.....	1,051 00	1,251 00
July 27	204	M'ch'ts' Nat. Bank...	Open ℔	$385 02	$7,810 32	.....	8,195 34

For the other papers referred to see the exhibits to complaints.

There were no other ordinances of the city read, except various ordinances showing that the city made appropriations to pay various debts and obligations contracted by it and for the purpose of paying current expenses.

86 The plaintiff also read in evidence extracts from the ledger of the city showing that the plaintiff had surrendered various city bonds printed on bank-note paper, and had received credit for the same on the ledger, in amounts corresponding with the amounts claimed in the complaint.

There was evidence tending to show, inter alia, the following state of facts:

In 1867 the members of the council had prepared the printed forms of bonds, amounting in the aggregate to one hundred thousand dollars, of denominations of one, two, five, ten, twenty, fifty, and one hundred dollars, payable in one, two, three, five, eight, and ten years, bearing interest from maturity, at eight per cent. per annum, printed on bank-note paper, with vignettes, having the form and general appearance of United States Treasury notes, of which one is hereto attached.

(One bond of the value of $20 and one of the value of $5 hereto attached.—PRINTER.)

These bonds were under the seal of the city and signed by the officers of the city.

87 The former mayor of the city, Judge Wassel, testified that he was such when these bonds were issued; that it was thought that the city had not the right to issue notes engraved in the form of bank bills, but that the city attorney advised the council that if the paper was in the form of bonds there would be no legal objection to it. It was under this advice that said bonds were issued.

88 There was evidence tending to show that when these engraved bonds were received they were signed by the mayor and proper officers and sealed by the city seal as occasion required, and that they were then deposited in the hands of the treasurer, and were by him paid out on ordinary city warrants drawn in the usual form, pursuant

to the order of the city council. The evidence tended to show that a large part of the bonds printed on bank-note paper was paid out for building a city hall, improving the streets, building school-houses, official salaries, and buying cemetery grounds for the city.

That these bonds or city money, as it was commonly called, was receivable for taxes, whether the bonds were due or not; that the revenue of the city for 1867 amounted to about sixty thousand dollars, and that of this amount all except about seven per cent. was paid in city money; that when the city money or bonds on bank-note paper was thus received, it was again paid out on the warrants of the city issued
89 under the orders of the council, so that it would be frequently received and paid out by the city; that the bonds on bank-note paper were used as a common currency in the city of Little Rock and the vicinity from the time of their issue until the latter part of 1873, when the banks refused to take them any longer, and they gradually fell in value from 100 cents until they could be bought at five cents on the dollar of their nominal value. There was evidence also showing that the bonds sued on and the ledger accounts sued on were given and allowed on the immediate consideration of the surrender of bonds printed on bank-note paper of the form and character above mentioned; also that during the time that the bonds on bank-note paper in circulation the plaintiff received them daily and paid them out, receiv-
90 ing them and paying them out always at one per cent. discount, the discount being used because it was apprehended that if the bonds were received and paid out at par the United States might make a claim that the paper thus received should be taxed.

There was evidence showing the state of facts stated in the charge of the court to the jury.

The plaintiff asked the court to charge the jury as follows:

I. That if the jury believe from the evidence that the bonds called "Little Rock City Bonds," of the denomination of $1, 2, 5, 10, 20, 50, and 100 each, were issued by order or direction of the city council of the city of Little , acting as such council, in payment of contracts previously made by said city council with contractors or other persons for work and material furnished to and accepted by said city, or in the purchase of sites for school-houses, the building of school-houses
91 thereon, and the support of school therein, or in the purchase of fire-engines therefor, or in the payment of the interest upon the bonded debt of said city, or in the payment of the maturing bonds of said city, or in the payment for grounds for a cemetery, or in the payment of a debt which said city might lawfully contract in the execution of any one or more of its municipal powers, and said bonds were taken and accepted by the person or persons to whom said city may have become indebted for any of the purposes aforesaid, as evidence of debt against said city of Little Rock, it is legally liable to the assignee of any one or more of said bonds for the payment of the same. (McMasters v. Reid, 1 Grant's cases, Pa., 41.)

II. That although a note or bond may be void, yet if the con-
92 sideration for which it was given be lawful, and the same is made payable to bearer, a transfer of the note will authorize the person to whom it was transferred to maintain an action for the original consideration; and if the jury find from the evidence that the bonds called "Little Rock City Bonds," of the denomination of 1, 2, 5, 10, 20, 50, & 100 each, are or were illegal and void; that, notwithstanding this, if they find that the defendant issued or paid out notes or bonds which were payable to bearer in payment of its corporate debts, and in the

taking up of warrants drawn on its treasurer for the payment of a debt contracted and incurred in the execution of some one or more of its municipal powers, and the same afterwards came into the hands of the plaintiff, and the plaintiff afterwards surrendered said bonds to the defendant at its request and was given in lieu thereof the bonds now in suit,
93 that the plaintiff thereby became the recognized assignee of the amount represented by the amount of said bonds, and may maintain an action thereon. (Oneida v. Ontario B'k, 21 N. Y., 490.)

III. That where a party has a valid subsisting claim or legal right, and waives it at the instance and request of another, who received the sole consideration for which said note or claim was given, such a waiver is a sufficient consideration to sustain a promise made thereon, and if the jury find, from the evidence, that the plaintiff, at the instance and request of the defendant, surrendered notes or bonds to the defendant, on which the person's name signed thereto were liable to the plaintiff, and which the defendant had paid out to take up its evidences of debt, and had received the sole consideration therefor, and afterwards took up the bonds or notes so paid out and destroyed the same, and
94 gave to the plaintiff the bond now sued on, that such a transaction would in connection with the waiver form a sufficient consideration to sustain a promise to pay, and sufficient to maintain an action upon. (Sykes v. Laffery, 27 Ark., 407.)

IV. That sections 745, 746, & 747 of Gantt's Digest, were in force at the time the bonds of the city of Little Rock, of the denomination of $1, 2, 5, 10, 20, 50, & 100 each, were issued, and were not intended to and do not apply to the notes or bonds issued by a municipal corporation, cities, or towns, as evidences of debt, and in payment of debts which cities or towns might lawfully contract to pay its creditors, but to private persons and corporations who intentionally create or put in circulation notes, bonds, bills, checks or tickets to be used as a currency or medium of trade in lieu of money.

95 V. That sections 748, 749, and 750, of Gantt's Digest were in force at the time the bonds of the city of Little Rock of the denomination of $1, 2, 5, 10, 20, 50, & 100 each were issued. That these sections contain all the law in force at that time applicable to cities and towns issuing small bills and notes commonly denominated change-tickets, or shinplasters, and that no penalty is imposed by any law of this State on any person or corporation for issuing, signing, countersigning, indorsing, receiving, passing, or putting in circulation small bills and notes commonly called shinplasters or change-tickets, issued by a city or town.

VI. That sections 746 & 751, of Gantt's Digest, were in force at the time of the issue of the bonds of the city of Little Rock of the denomination of $1, 2, 5, 10, 20, 50, & 100 each, and were intended to apply to and only have reference to notes, bills, bonds, checks, or tickets,
96 which may have been issued on the credit of the person or persons signing the same, in the sense and for the object which bank bills are issued, and were not intended to apply to notes, bonds, bills, checks, or tickets, originally given for the payment of just and valid debts of the person or corporation signing the same, or for the purchase of goods, wares, and merchandise, and if the jury find from the evidence that the bonds of the city of Little Rock, of the denominations aforesaid, were in good faith issued and used by the defendant solely and only for the payment of its debts, and that the payment of the debt was not a mere device to cover up an intention to create and issue and put in circulation small bills, notes, drafts, checks, bonds, or tickets as

a currency or medium of trade in lieu of money, then and in that event said sections have no application to the bonds of the city of Little Rock of the denominations aforesaid.

97 VII. That although the jury may find from the evidence that the bonds called "Little Rock City bonds," of the denomination of $1, 2, 5, 10, 20, 50, & 100 each, were issued without authority of and in contravention of law, yet if the jury find, from the evidence, that the defendant furnished its treasurer with said illegal bonds for the purpose of taking up and paying of warrants drawn on said treasurer by the defendant, to pay a just and valid debt of said city, and the treasurer thereof took up and cancelled said warrant or warrants with said "Little Rock City bonds" of the denominations aforesaid, which had been furnished said treasurer by the defendant, and the defendant afterwards took up said bonds and gave to the plaintiff bonds now in suit in lieu of the bonds which had been paid out to take up the warrants drawn for the payment of the just and valid debts of said

98 city, the law regards this as a settlement of the original transaction, and that the bonds now sued on are founded on a good and sufficient consideration. (Clark v. City of Des Moines, 19 Iowa, 225; Early v. Mahon, 19 Johns. N. Y, 147; Wright v. Hughes, 13 Indiana, 113.)

VII'. That there is nothing in the act of incorporation or charter of the city of Little Rock in force at the time the bonds called "Little Rock City bonds," of the denomination of $1, 2, 5, 10, 20, 50, & 100 each, were issued prohibiting said city from giving to its creditors bonds or other evidences of debt, for debts contracted in the discharge and execution of any one or more of its corporate powers. (People v. Brennan, 39 Barb. N. Y., 522; State vs. City of Madison, 7 Wis., 688; Mills vs. Gleason, 11 Wis., 470; Diveley v. Cedar Falls, 21 Iowa, 566; Clark v. Des Moines, 19 Iowa, 225.)

99 IX. That the burthen of proof to show that the bonds issued by the city of Little Rock, of the denomination of $1, 2, 5, 10, 20, 50, & 100 each, were issued in violation of law, is on the defendant, and that the question of illegality must be determined from facts and not from deductions, inferences, opinions or the general appearance of the bonds, but from the intention which existed at the time the bonds were delivered. (Cuyler v. Sanford, 8 Barb. N. Y., 215; Bayley vs. Tabor, 6 Mass., 451; Diveley v. Cedar Falls, 27 Iowa, 227; Whetstone v. Bank of Montgomery, 9 Ala., 879.)

X. That the mere fact that members of the city council may have contemplated, at the time of authorizing the issue of the bonds, called "Little Rock City bonds" of the denomination of $1, 2, 5, 10, 20, 50, & 100 each, that they might or would become a convenient circulating medium, would not make their issue a violation of law; nor would

100 the city be released from liability from the fact that said bonds were afterwards used by individuals or the community generally as a circulating medium. (Dively v. Cedar Falls, 27 Iowa, 227.)

XI. That there is no statute forbid'ing persons or municipal corporations from embellishing their notes or bonds with all the ornaments taste may tempt or skill devise, and that the presence of all the peculiarities of a bank note would not make an instrument a bank bill, a small note, bill, check, or change ticket, if it was not the intention of the party making and issuing it, that it should be so used. (James admr., v. Rogers, 23 Ind, 453; Morse on Banking, 396.)

XII. That an original good consideration is not destroyed by the issuance of a void paper, and when the void paper is taken up, by the

party who issued it, and new obligation given, the original con-
101 sideration continues; and if the jury find, from the evidence, that the city of Little Rock used a void paper in taking up its evidence of debt and in the payment of its debts, and afterwards took the same up and gave a valid evidence of debt therefor, the last evidence of debt represents the original consideration, and that the statute of limitation only begins to run from the maturity of the last obligation. (Early v. Mahon, 19 Johns. N. Y., 147; clark v. Des Moines, 19 Iowa, 225.)

Which instructions so asked by the plaintiff the court refused to give.

The defendant asked the court to charge the jury as follows:

Instructions asked by the defendant.

1. The jury are instructed that on the whole of the evidence the defendant is entitled to a verdict.

2. Unless the jury find from the evidence that the plaintiff received the warrants and other evidences of debt (mentioned in the com-
102 plaint as having been surrendered to the city for the obligations and promises sued on), as collaterial security for loans, or in payment of loans and discounts made by the plaintiff, they will find for the defendant.

3. It is conceded that the obligations and promises sued on are based on the consideration of certain city bonds on bank note paper surrendered by the plaintiff to the city. As to these surrendered bonds the court instruct the jury that they will find for the defendant in case they find either of the following states of fact to exist:

1. If the said surrendered bonds were issued for any other purpose than that of borrowing money.

2. If the said surrendered bonds purported that money would be paid to the receiver, holder, or bearer thereof, with the intention that
103 the same should be used as a currency or medium of trade in lieu of money, or if they were specially adapted for that purpose.

4. If the jury find that the bonds surrendered bore interest at eight per cent., and that upon the issue of the bonds sued on the interest of the old bonds was cast up, and that the new bonds were given for the principal and interest thereof, and that the new bonds bear interest at the rate of ten per centum per annum, the jury will find for the defendant as to the bonds sued on.

5. The burden of proof is on the plaintiff to show such a state of facts as would authorize the city to make the obligation and promises sued on, and the plaintiff is not entitled to recover unless the jury are satisfied from the evidence that the bonds sued on were issued for the purpose of extending the time for the payment of the paper for which the new bonds were issued.

104 6. That the surrendered bonds would have no validity as against the defendant unless they were issued under an ordinance of the city, and unless it is shown that there was an ordinance of the city council authorizing the issue of the said surrendered bonds, the jury will find for the defendant.

Additional instructions asked for the defendant.

7. The jury cannot find for the plaintiff, on the ground of the original causes of action for which the city money or bonds on bank-note

paper were first given, unless they find that the causes of action for which such bonds on bank-note paper were given accrued, that is, fell due, within three years next before the commencement of this suit.

8. Under the instructions given by this court the jury are di-
105 rected to allow the plaintiff the benefit, as equitable assignee, of the causes of action for which the bonds on bank-note paper were issued; but the jury are now told that if they find that the bonds on bank-note paper were taken up by the city and paid out again by it, and that such was the regular practice of the officers of the city, the bonds would not represent the causes of action for which they were first paid out, but they would only represent the causes of action for which they were last paid out; and the jury will find for the defendant, unless they find from the evidence that such last paying out of said bonds on bank-note paper was prior to the 9th day of April, 1869.

The court refused to give any or either of said instructions, and to the refusal to give each the defendant at the time excepted.

The court then, on its own motion, orally gave the following
106 opinion and charge to the jury, viz:

GENTLEMEN OF THE JURY: I will make a brief statement of the case for the purpose of putting the facts upon the record, which will, perhaps, largely supply the necessity for more elaborate findings. This case is brought to recover on certain bonds of the city, numbered from 1 to 156, issued in 1874, under the power conferred by section 3294, Gantt's Digest of the Laws of Arkansas.

There is also a common count, based upon the same cause of action, and then another claim for an account, known as the ledger account, which is in the nature of an acknowledgment of the liability of the city under the ordinance of October 30, 1874.

It seems that the city, being indebted, and wanting to borrow money to pay such indebtedness & defray the necessary current expenses
107 of the city government, in January of 1867, by the action of its council, resolved to borrow the sum of $100,000, specifying that $50,000 was for the establishment of schools, and $50,000 for other purposes. Judge Wassell, who was a member of the city council, testifies that at the time of the consideration of the question of the form in which the city could issue her obligations, this form of issuing the obligations of the city was deemed the most expedient—that is, to issue her obligations for money in the form of bonds. They could not, he testified, issue money. They could and did issue bonds, and that they were advised by the city attorney that they had the power to do so.

The bonds which were issued were issued in denominations of one dollar, two dollars, five dollars, ten dollars, twenty dollars, fifty dollars, and one hundred dollars. The bonds were engraved with vignettes
108 on colored paper, and in form and appearance very nearly resembling the ordinary greenback or bank bill. The bonds in this form purporting to be Little Rock City bonds, running for periods of from one to ten years, amounted in the aggregate to $100,000. Here is the form of the paper so issued: "Ten years after date the City of Little Rock will pay five dollars to bearer, with interest at the rate of eight per cent. per annum, at maturity. Little Rock, Arkansas, July 22, 1867." Signed by the recorder and by the mayor and under the seal of the city.

These bonds were paid out by the city for various classes of ordinary indebtedness.

According to the testimony of Judge Wassell, a portion of this money

was expended under the direction of the city council, $3,500 to pay for the lot on which stands the present city hall, and $17,500 for the erection of the present city hall; $6,000 went to pay overdue coupons
109 on bonds issued by the city under legislative authority, in aid of the Memphis and Little Rock Railroad Company; $4,000 to put up the Peabody school-house; $6,000 was appropriated and went to pay the interest on those Memphis bonds; $3,600 to grade Markham street; $2,000 for culverts, and $5,000 and $2,000 for improvement of Ferry street; $2,000 to purchase cemetery grounds; $3,600 for the fire department; $8,000 for improving and extending the public landings; $2,000 and $4,000 for school sites, and from $1,500 to $1,700 per month was paid out and on audited claims against the city for police services, salaries of city officers, gas, and so forth.

It was paid out to persons who were creditors of the city for property sold it, or for materials furnished or labor performed for it, and for official salaries.

The evidence shows, and it is undisputed, that when claims were allowed against the city by the council, a warrant was drawn on
110 the treasurer of the city, in the usual form, and when *the* was presented to the treasurer, what was called "Little Rock City bonds" on bank-note paper, were paid out by the city on those warrants, the warrant being taken up and this paper given out in exchange for it.

The city received it for taxes, in the payment of licenses and other dues, and it passed in and out the city treasury frequently. If not generally put out again, it was reissued to some extent. The evidence further shows, and it is an undisputed fact, that this paper for some considerable period constituted a very considerable portion of the circulating medium of the city; it was taken in and paid out by the merchants, bankers, and others, and the Merchants' National Bank of this city, the plaintiff, received a very large amount of it. Undoubtedly it is true that a considerable portion of the bonds or claims sued on were
111 for money of this character, termed "city bonds," or "city money," which the plaintiffs had received in the course of their business as bankers. It does not appear that the present plaintiffs were connected originally with the issuing of this money by the city; it was not issued to advance any scheme of the *of the* plaintiff, or for any consideration furnished by it, nor by its procurement; nor was the plaintiff in anywise connected with the inception of it.

Afterwards, the city council passed an ordinance by which they invited the holders of this sort of paper to bring it in for cancellation, agreeing to issue to them new obligations of the city for the amount of the principal of those city bonds and the accrued interest thereon. The evidence shows, it is undisputed, that under that authority the present holders surrendered to the city the sum of $31,000, including accrued interest of $354.22.

They were cancelled and destroyed by the city, and in lieu of
112 the amount of them then due, the city issued a like amount of bonds, to wit, the bonds in this suit.

The plaintiffs also had some other paper which they surrendered in like manner, and the same was cancelled by the city, which acknowledged its indebtedness for the amount by giving the plaintiff credit therefor on its ledger, and this is what is known as the "ledger account."

The plaintiff shows that the new bonds were given for the principal and interest of the overdue bonds, on bank-note paper, and the amount

credited on the ledger account is for like bonds, and for which new bonds were not issued.

The City of Little Rock defends against this action, and its main defense is: The emission of these bonds in this form on bank-note paper, and for the purposes as it appears on their face for which they were issued and circulated as money, was in direct violation of the statutes of the State in that regard, and, therefore, that the bonds thus
113 issued were illegal and void, and that the new bonds issued in lieu thereof were also illegal, void, and without consideration, the issuing of the original bonds having been in violation of the statutory prohibition, and therefore not imposing any legal obligation upon the city.

This defense makes it necessary to inquire into the legislation on this subject in this State. I will however state in this connection that the court finds and instructs the jury that the issuance of city bonds on bank-note paper, engraved with vignettes in the similitude of greenbacks or bank-bills, in the denominations of 1s, 2s, 5s, 10s, 20s, 50s, and 100-dollar notes, in connection with the undisputed fact that they formed for a considerable period the local circulating medium for this city and community in lieu of currency, establishes that such bonds were issued for the purpose of circulating as money in violation of the statutes of the State in that regard.

114 But it is quite another question, and one not necessary to be decided in this case, whether the statutes of the State in reference thereto and the expositions thereof by the supreme court of the State, that the city would not be held responsible to the holders of such bonds issued in payment of legal claims duly passed upon.

I think it will be better to refer to the legislation upon this subject chronologically rather than in the order in which it is embodied in Gantt's Digest, chapter 19, page 256. It would appear from the legislative acts that the State of Arkansas has for a long time had a very pronounced and decisive policy against the issue by persons or by private or public corporations of paper designed to *to* pass as a circulating medium, and no one can say in the light of experience but that it is a wise policy.

The first act of the legislature upon the subject appears in the Revised Statutes of Arkansas of 1838, page 674. It is entitled
115 "private notes." No title to this act is given, but the title may be seen in another act, afterwards passed, which went into effect February 14, 1838 (section 5 of the act entitled "change tickets," chapter 24, p. 175, Revised Statutes), where are these words:

"SECTION 5. The act passed at the session of the general assembly entitled 'An act to prevent the circulation of private notes in this State,' approved November 25, 1837, shall take effect and be in force from and after the first day of March next."

This first act, entitled "private notes," was passed and approved November 25, 1837, and went into effect on the 1st day of March, 1838, and it is an important consideration, in order to understand the legislative intention, that the act entitled *to* "change tickets" was last passed, though first to go into effect. The first act in its first section provides as follows:

"No person or persons, unauthorized by law, shall intentionally
116 create or put in circulation, as a circulating medium, any note, bill, bond, check or ticket purporting that any money or bank-notes will be paid to the receiver, holder, or bearer, or that it will be

received in payment of debts, or to be used as a currency or medium of trade in lieu of money."

The next section provides:

"If any person or persons shall issue, put in circulation, sign, countersign, or indorse any such note, bill, bond, check or ticket, he, she, or they, so offending, shall be indicted, and being thereof convicted, shall be fined not less than fifty nor more than three hundred dollars, and be imprisoned not exceeding twelve months."

Section 3 it is important to consider:

"SECTION 3. If any person or company vend, pass, receive, or offer in payment any such note, bill, bond, check, or ticket, he, she or
117 they, so offending, shall forfeit the sum of fifty dollars, to be recovered by action of debt, with costs, to the use of any person who will sue for the same before any justice of the peace of the county in which the party offending may be found.

"SECTION 4. The preceding section shall not affect any note issued by any bank authorized by law in the United States, except notes for less sum than five dollars.

"Approved November 25, 1837; in force March 1, 1838."

Now it will be observed that corporations, private or public, are not in terms mentioned in this act.

By the first section the terms of prohibition is that no person or persons, unauthorized by law, shall issue or put in circulation this authorized currency.

By section 21 of chapter 129 of the same Revised Statutes it is provided that "when any subject-matter, party, or person is de-
118 scribed or referred to by words importing the singular number of the masculine gender, several matters and persons, & females and well as males, and bodies corporate as well as individuals, shall be deemed to be included;" and by section 24 of the same chapter it was further provided that, "for the purpose of construction, the Revised Statutes passed at the present session of the general assembly shall be deemed to have been passed on the same day, notwithstanding they may have been passed at different times; if any provisions of different statutes are repugnant to each other, that which shall have been last past shall prevail, and so much of any prior provision as may be inconsistent with such last provisions shall be deemed repealed thereby."

In case arising some years after the question was presented in
119 the supreme court of the State as to whether the word person as used in the act approved November 25, 1837, included corporations, and municipal corporations, and the supreme court in the case of Van Horn vs. The State (5 Ark., 349) held that the word person did include corporations, public and private. If that is so, then we must hold this statute to read the same as though "corporations" had been expressly mentioned, for by construction the supreme court has incorporated the word corporations into the original statute, and when section 3 is read in the light of this construction it provides not only if any person or persons but also if any corporation or corporations pass, receive, or offer in payment any of this illegal money, they are liable to a penalty to be recovered by any person suing for it. And if this statute were without any modification, we have an interpretation by the supreme court of the State that corporations of all kinds, as
120 well as private persons, are alike prohibited and liable to penalties, and not only to that effect, but the person who receives the

money or offers it in payment is also made criminally subject to a penalty; so while this statute provides against any person who shall put out an unlawful medium of circulation, if the law was still unmodified there would be strong grounds to claim if it should be violated, and unfortunately all laws are violated, that the person who received and the person who attempted to offer it in payment were both in pari delicto, for it is made criminal against him to issue it, it is equally made penal against any person to receive it, and it is therefore equally in violation of the general purpose of the law, and there would be no right to recover under this act as it originally stood.

But before the session of the legislature closed they passed an-
121 other act (the act approved February 14, 1838), which, in terms, refers to the subject-matter of the previous act, and modified it by discriminating in favor of the person who holds the money issued in plain violation of the provisions of the law. It reads:

"SECTION 1. The holder or owner of any change ticket, bill, or small note, issued for the purpose of change or otherwise, shall have the right to sue the drawer, issuer, or indorser of such change ticket, bill or bills, or small note or notes, before any justice of the peace in this State"; allowing him to recover in respect of the money issued, contrary to the prohibition of the prior act. We must conclude that subsequent consideration convinced the legislature that it was better not to punish the innocent receiver.

Now there can be no doubt by the inspection of the original statutes that the supreme court of the State in Van Horn vs. State was
122 correct, nor is there any different principle involved in holding municipal corporations issuing this scrip, equally with individuals or private corporations, liable to the innocent holder not procuring it to be issued.

There is another act in support of the view I have just stated, the act of December 17, 1838, entitled "An act to prohibit the issuing of small bills, notes, or change tickets."

The first section provides:

"That from and after the passage of this act it shall not be lawful for any city, town, or corporation whatever, within the State of Arkansas, to issue small bills or notes, commonly denominated change-tickets or shinplasters, unless specially authorized by law.

"SEC. 2. That all persons, officers of such city, town, or corporation, or others, whose names shall be affixed to any such bills, notes, change-tickets, or shinplasters, issued in violation of this act, shall be individually responsible for the same."

123 This act extends the liability to all persons, officers of any corporation or town, or others, whose names shall be affixed. Private corporations would be liable, and if any of its officers put his name to such bills or change-tickets, it imposes a personal liability on him.

"SECTION 3. That the holders of any such bill, note, change-ticket, or shinplaster, issued in violation of this act, may sue for and recover in gold and silver the amount for which they purport to be payable, from the individuals whose names shall be affixed thereto, before any justice of the peace."

This act did two things: At the time it was passed, the Van Horne case, in which the supreme court of the State had decided that municipal corporations were included in the first act, had not been decided, and this act removed any doubt as to whether municipal corpora-
124 tions, with others, were embraced within the inhibitions of the original act; and secondly, it gave an additional remedy against

the officers of the municipal corporation, making them also personally liable to the holder, but it did not take away any right or remedy given to the holder by the former act. Since the legislature chose to pass this special act relating to municipal corporations, it may be said the supreme court erred in deciding that corporations were included in the original act. But as between the legislature and the supreme court, the latter is the proper and best interpreter of the meaning of previous acts of the legislature, and besides, this last act had been passed & in force three or four years before the case of Van Horne vs. The State was decided.

Subsequently, in the case of Jones vs. City of Little Rock, (25 Ark., 301,) the court decided that the parties seeking relief were not
125 the proper parties to apply for it, and, in delivering the opinion of the court, it was held that there was no right to issue this paper, and in the course of the opinion it is said, arguendo, that if it was issued contrary to law the city would not be liable for it. The latter statement was clearly dictum, and it is claimed that so much of the opinion in Van Horn vs. The State as holds the city is liable for issues is dictum also. If this is so, one dictum equals the other. I cannot say that these decisions are conclusive in settling this statute, but it is clear to my mind that although this paper was issued in violation of law the legislature did not intend that the innocent holders of such paper should be held liable to all of the penalties imposed on those who receive it by the terms of the first act.

Charge to the jury.

126 First. The court instructs the jury that the form and appearance of the city bonds on bank-note paper, engraved with vignettes, in the similitude of greenbacks or bank-bills, and of the denomination of one dollar, two dollars, five dollars, ten dollars, twenty dollars, fifty dollars, and one hundred dollars, in connection with the undisputed fact they did form for a considerable period a local circulating medium, and were used by the city and the community in lieu of currency, establish that the said bonds were issued for the purpose of circulating as money, and in violation of the statutes of the State in that regard.

Second. It is quite another question, and one not necessary to be decided in this case, and which we do not decide, whether, under the statutes last referred to, in view of the exposition thereof by the supreme court of the State, the holder of such bonds, if in no wise con-
127 cerned in their illegal issue, and if they represented or were issued for a valid and legal claim against the city, could not recover thereon against the city. Nor is it necessary to determine whether the act of December 14, 1875, has the effect to validate city money, so called, of the character of the bonds issued by the defendant city, known as city bonds on bank-note paper.

Third. The immediate consideration of the bonds in suit was the surrender by the plaintiff to the defendant of an equal amount, including interest, of what are styled "city bonds on bank-note paper," all of which last-named bonds were overdue at the time of such surrender, and of date prior to July 13, 1868, and which were held and owned by the plaintiff at the time of such surrender, and which had been origi-
128 nally issued to other persons than the plaintiff in exchange for or payment of the ordinary warrants of the city, issued to divers persons upon valid claims against the city, audited and allowed by the city council.

The city bonds on bank-note paper thus held by the plaintiff were, at the instance of the city, surrendered to it and destroyed by it, and the bonds in suit issued therefor; assuming, but not deciding, that if in the hands of the plaintiff the said city bonds on bank-note paper could not have been enforced in an action directly on said bonds against the city.

(The charge from here out was excepted to by defendant.)

The court is of the opinion, and so instructs you, that the bonds in suit issued by the defendant in lieu of said bonds on bank-note paper (the last-named bonds having been originally issued under the circumstances above stated for valid debts against the city to other
129 creditors of the city than the plaintiff, and the plaintiff not having been connected with their issue), constitute a valid ground of action against the city, and the city is liable thereon to the plaintiff, although the said city bonds on bank note paper were of such an appearance and of such a form as to be especially adapted to constitute a circulating medium, and were in fact used in and about the city as a local circulating medium in lieu of money.

Fourth. There is also a claim against the city for the amount of certain city bonds on bank-note paper surrendered by the plaintiff to the city at its request, for which the city issued no new bonds, but placed the amount of the bonds surrendered by the plaintiff and destroyed by the city to the credit of the plaintiff on the ledger of the city. The same principles of law apply to this claim as to the claim on the new bonds.

130 Fifth. Under the foregoing views there is no question of the statute of limitation in this case, although it is probable under the "call" made by the city in 1875, and the action taken thereunder, this defense would in no event be available to the city, but it is not necessary to rule the point.

Under these instructions you will find a verdict for the plaintiffs for the amount of the new bonds issued in lieu of the bond' surrendered, and the amount placed as a credit to the plaintiffs on the ledger-account of the city, which was introduced in evidence.

Judge Caldwell concurs in these views.

And the defendant at the time excepted to all that part of the charge thus given, begin'ing with the words "the court is of opinion, and so instructs you, that the bonds in suit issued by the defendant in lieu
131 of said bonds on bank-note paper," to the end of said charge.

And at the time of the taking of each of the exceptions herein named, the defendant asked and obtained leave to file her bill of exceptions at any time during the present term of the court.

And now that the said exceptions may be reserved, on this day and during the same term of the court, the defendant presents here this her bill of exceptions, which, having been examined and found correct, is by the court signed, sealed, and made a part of the record in this cause on the 4th day of May, 1878.

[SEAL.] JOHN F. DILLON,
Circuit Judge.

And on June 15, 1878, as follows:

On this day came the plaintiff, by John McClure and Yonley & Whipple, its attorneys, and also came the defendant, by N. M. Rose
132 and B. S. Johnson, her attorneys, and the writ of error sued out to the judgment in this cause by said defendant is allowed, and a

copy of the same is filed with the clerk, and the bond of the defendant is filed and approved, and the said plaintiff acknowledges service of the citation herein.

Which bond is as follows:

Know all men that we, the city of Little Rock as principal, and N. M. Rose as surety, are bound unto the Merchants' National Bank of Little Rock, Ark., in the sum of two hundred and fifty dollars, on condition that whereas said city of Little Rock has sued out a writ of error to the Supreme Court of the United States, on a judgment rendered by the United States circuit court for the eastern district of Arkansas, in favor of said national bank, and against said city, returnable on
133 the second Monday in October, 1878:

Now, if said city of Little Rock shall prosecute said writ of error to effect, and answer all damages and costs if she fails to make her plea good, then the above obligation shall be null and void; else to remain in full force and virtue.

This June 14, 1878.

[SEAL]. N. M. ROSE.

Taken and approved as a bond for costs, June 14, 1878.

HENRY C. CALDWELL,
Dist. Judge.

Which citation is as follows:

134 The United States of America to the Merchants' National Bank of Little Rock, Ark., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Arkansas, wherein the city of Little Rock is plaintiff in error, and you are defendant in error, to show cause, if any there be, why a judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Henry C. Caldwell, judge of the district court, this 14th day of June, A. D. 1878.

[SEAL.] HENRY C. CALDWELL,
District Judge.

Service on the defendant in error acknowledged June 14, 1878.

JOHN McCLUER,
YONLEY & WHIPPLE,
Atty's for Defendant in Error.

(Indorsed:) Merchants' Nat. Bank v. City of Little Rock. Citation. Filed June 15, 1878. Ralph L. Goodrich, clerk.

135 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript annexed to this certificate is a true, correct, and compared copy of the original remaining of record in my office.

In witness whereof I have hereunto set my hand and the seal of said court this 28th day of June, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States of America the one hundred and second.

Attest:

[SEAL.]

RALPH L. GOODRICH,
Clerk.

(Indorsement on cover:) No. 714. The City of Little Rock, plaintiff in error, vs. The Merchants' National Bank of Little Rock, Arkansas, E. Arkansas C. C. U. S. Filed 6th July, 1878.

IN THE

SUPREME COURT

OF THE UNITED STATES.

THE CITY OF LITTLE ROCK, *Plaintiff in Error,* vs. MERCHANTS' NATIONAL BANK, OF LITTLE ROCK, ARKANSAS, *Defendant in Error.*	*IN ERROR TO CIRCUIT COURT FOR THE EASTERN DISTRICT OF ARKANSAS.*

BRIEF FOR PLAINTIFF IN ERROR.

BY U. M. ROSE.

Little Rock:
PRINTED BY A. H. SEVIER, PROPRIETOR "GAZETTE" BOOK AND JOB PRINTING HOUSE.
1876.

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BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

In 1867 the Common Council of Little Rock concluded to increase the circulating medium of the country, with the laudable design of increasing its actual wealth. On the 22d day of January, of that year, the mayor sent in a message (tr. 11) to the council, in which he took "an impartial review of the real situation of our people." In this "impartial review" the mayor mentioned pathetically that "the people, as a whole, will not own, control and handle this year more than half the amount of money that they did control last year; and unless the people have money it will be hard for them to pay."

The remedy for this unfortunate state of affairs was, of course, obvious.

The mayor suggested the expediency of filling the "vacuum" caused by excess of payments by the people over their incomes by a proper use of the credit of the city. "It seems," he said, "that when a city or individual is poor, it is the time he should

use his credit, if ever; and a city may be excused, at least, for using her credit for making public improvements for the use of the present and coming generations to enjoy."

These highly respectable financial truisms were fortified by a "Report of Finance Committee," (tr. 12) which presented a more philanthropic and humanitarian view of the question. Passing by the portentous "vacuum" which had been sufficiently explained and deplored, the committee spoke sadly and discontentedly of the need of public schools. They said:

"Our poor children, uneducated, are permitted, nay, compelled, to grow up in ignorance, and all its attendant evils, candidates for a life of toil, uselessness, and all its train of evil consequences, and at death the poor consolation that their lives have been in great part a blank, owing to the fact that they were raised in the city of Little Rock without education and its blessings."

Like Lord Bacon, the committee expressly entrusted their vindication to later and wiser generations of men.

In order that no one might grow up a candidate for a life of toil and uselessness, the committee recommended, "that at once the sum of fifty thousand dollars in city bonds be issued for the purpose of inaugurating to us a new and too-long delayed public enterprise—a system of common schools; and a further sum of fifty thousand dollars, to be expended as the wisdom of the council shall direct."

These documents were presented to the common council on the 22d of January, 1867. The council passed no ordinance for the issue of the so-called bonds. The proceedings of that date only show the following steps as being taken looking to their issue:

"On motion of Mr. Weeks, the interest on the bonds of the city to be issued was fixed at 8 per cent. per annum.

"A special committee was appointed for taking the necessary steps in regard to issuing said bonds. Hooper, Wassell and Weeks, committee." (Tr. 13.)

It appears, however, that without any ordinance the bonds

were prepared for issue, for the proceedings of the council of May 21, 1867, include the following:

"Alderman Henry offered the following resolutions:

"*Resolved*, That the bonds issued by the city shall be received for all the city dues of whatever kind.

"Adopted.

"*Resolved*, That the city bonds, in blanks, shall be placed in custody and keeping of the finance committee, and no bond shall be issued for any purpose only by resolution of this council.

"Adopted." (Tr. 13.)

These papers are attached as exhibits to the complaint in this case, as showing authority for the issue of the bonds; and this is all the authority there was of a written kind. (Tr. 23.)

The bonds thus prepared amounted all together to the nominal sum of one hundred thousand dollars; and were in denominations of $1, $2, $5, $10, $20, $50, and $100, payable in one, two, three, five eight and ten years, bearing interest from maturity at eight per centum per annum. They were printed on bank note paper, with vignettes, having the form and general appearance of United States Treasury notes. (Tr. 23.) Two of them are sent up here with the transcript, so that the court may contemplate them *in puris naturalibus*.

The council had now a reservoir from which it drew with an unstinted hand. It built a city hall, it improved streets, it built school-houses, it paid official salaries, it bought cemetery grounds. (Tr. 24.) What else it did was too manifold to be recorded. Whenever it wanted any money it drew from its supply of "city money," as the bonds were called. The "city money" went into common circulation; the citizens, generally, used it; and the plaintiff in this suit took it daily, always receiving and paying it out at one per cent. discount, to keep from being taxed on it by the federal government. The "city money" not only circulated among the people, but it was paid into the city treasury and was paid out again as occasion might require. The revenue for 1867 amounted to about $60,000, and all of this, except about seven per cent., was paid in the city money. In the latter

part of 1873 its fortunes declined; it fell as low five cents on the dollar.

The form of these bonds was as follows:

"—— years after date the city of Little Rock will pay —— dollars to bearer, with interest at the rate of eight per cent. per annum at maturity." Dated, signed by the mayor and recorder, and sealed with the corporate seal.

Seeing that the city money was about to become extinct, the council made provision for taking it up and giving new bonds in lieu of them, including principal and interest, the new bonds to be payable one year from date, with interest at *ten* per cent. per annum. This was on the 15th of August, 1873. (Tr. 14.)

On the 30th of October, 1874, the council adopted a further ordinance, providing that the holders of the city money might surrender it to the city clerk, who should allow them the amount of such money, principal and interest, as a credit, and that the amount of this credit should bear interest at the same rate as the city money. (Tr. 15.)

Observe that the ordinance providing for the issue of new bonds expressly describes the city money as "bonds heretofore issued on bank note paper, for the purpose of circulation as currency." (Tr. 14.)

The Merchants' National Bank of Little Rock, having obtained much of this city money, surrendered it, and received new bonds in the form prescribed by the ordinance. The form of the bond is seen on page 5 of the transcript. The bank also surrendered much of its city money, for which it did not receive new bonds, but secured a credit on the books of the city. This suit was brought on the new bonds and the assumpsit of the city; and the complaint and its exhibits show the whole history of the grounds of the action with rather commendable candor and fidelity.

The defendant pleaded:

1. That the bonds and other contracts sued on were made in consideration only of the surrender of the city money issued in violation of statute.

2. That the various bonds and other contracts mentioned were not authorized by the city.

3. That the new bonds increased the indebtedness of the city, and did not extend the time for its payment.

4. That there was no ordinance or other corporate act of the city authorizing the making of said bonds and other contracts.

5. That the city money and other paper were not issued for any loan, but only for appropriations of money, at a time when there was not in the city treasury money unappropriated sufficient to pay them.

6. That if the plaintiff claims as equitable assignee of the demands for which the city money was issued, such demands are barred by the statute of limitation of three years.

7. That the ledger accounts are based only on the consideration of the surrender of city money issued in violation of law.

8. That the city never authorized the issue of the city money, which formed the only consideration for the ledger account.

11. Repeats No. 4, and applies it to the city money surrendered and credited on the city ledger.

12. Repeats No. 5, and applies it to the city money surrendered and credited on the ledger.

13. Limitation of three years as to the ledger accounts.

14. Non-assumpsit as to the ledger accounts.

15. Denies that the city made any of the contracts or promises sued on, says that they were illegal and were without any legal consideration. (Tr. 18.)

Originally there were two suits, begun October 1st and October 4, 1877, but they were consolidated and tried as one cause before Dillon and Caldwell, J. J., April 26, 1878.

Under peremptory instructions from the court, the jury returned a verdict in favor of the plaintiff for $38,640.40, for which the court rendered judgment, adjudging, also, that $28,512.16 of the amount should bear interest at ten per cent. per annum. (Tr. 21.) Defendant sued out a writ of error.

Such is a brief history of the case. Before proceeding further it seems proper to say that eleven pages of the record, pages 90

to 100, are made up of instructions asked by the plaintiff below, which were inserted in the bill of exceptions by the direction of the circuit judge. As the plaintiff below excepted to no ruling, and had plenary judgment, we confess to inability to comprehend why these instructions should be brought before this court. Laboring under these disadvantages, it can hardly be expected that we should notice them further.

We wish, also, to say that on reflection we think it proper to abandon the exception to the refusal to give the second instruction asked by defendant, to the effect that it was the duty of the plaintiff to prove that it had received the evidences of debt mentioned in the complaint in some manner authorized by its charter. It is true that the complaint makes specific allegations as to the manner in which the plaintiff became possessed of the paper; but the better opinion is, we think, that these allegations were superfluous and need not be proved. *Green's Brice's Ultra Vires*, p. 39, *et seq.*

The court in its charge gave a sort of general history of the financial operations of the city council, out of which the suit has its origin, in which there is one expression that might mislead if the rest of the bill of exceptions was not regarded. We refer to that part where the learned judge says that "the city being indebted and wanting to *borrow money* to pay such indebtedness and defray the necessary current expenses of the city government, in January of 1867, by the action of its council *resolved to borrow* the sum of $100,000, specifying that $50,000 was for the establishment of schools, and $50,000 for other purposes."

If this were taken by itself, one might suppose that the city had actually borrowed $100,000; but such was not the case, for it appears by the next paragraph of the charge that the city money was paid out "for various classes of ordinary indebtedness," and not for money lent. Besides, the original evidence relating to the matter is set out in the bill of exceptions (tr. 23), and there was no question made either by the council, mayor or any one else of borrowing any money. The court, also, on page 108 of the Record, show how a large part of the city money was

paid out. The complaint also (tr. 7) states that the city money was issued and used in paying debts, buying property, etc. The court could then only have used the word "borrow" in the sense that the city extended its credit by issuing the city money. Also the court used the word "resolved" in the sense of a mental or volitional resolution; for there was no formal or written resolution to that effect. This is explicit. The bill of exceptions sets out various ordinances of the council, and refers to those of which copies were filed as exhibits to the complaint, and then says:

"There were no other ordinances of the city read, except various ordinances showing that the city made appropriations to pay various debts and obligations contracted by it, and for the purpose of paying current expenses."

ASSIGNMENT OF ERRORS.

1. The court erred in refusing to give the following instruction asked by the defendant:

"(1.) The jury are instructed that on the whole case the defendant is entitled to a verdict."

2. The court erred in refusing to give the following instruction asked by defendant:

"(3.) It is conceded that the obligations and promises sued on are based on the consideration of certain city bonds or bank note paper surrendered by the plaintiff to the city. As to these surrendered bonds the court instruct the jury that they will find for the defendant in case they find either of the following states of facts to exist:

"(1.) That the said surrendered bonds were issued for any other purpose than that of borrowing money.

"(2.) If the surrendered bonds purported that money would be paid to the receiver, holder, or bearer thereof, with the intention that the same should be used as a currency or medium of trade in lieu of money, or if they were specially adapted for that purpose."

3. The court erred in refusing to give the following instruction asked by the defendant:

"(4.) If the jury find that the bonds surrendered bore interest at eight per cent., and that upon the issue of the bonds sued on the interest of the old bonds was cast up, and that the new bonds were given for the principal and interest thereof, and that the new bonds bear interest at the rate of ten per centum per annum, the jury will find for the defendant as to the bonds sued on."

4. The court erred in refusing to give the following instruction asked by the defendant:

"(5.) The burden of proof is on the plaintiff to show such a state of facts as would authorize the city to make the obligation and promises sued on, and the plaintiff is not entitled to recover unless the jury are satisfied from the evidence that the bonds sued on were issued for the purpose of extending the time for the payment of the paper for which the new bonds were issued."

5. The court erred in refusing to give the following instruction asked by the defendant:

"(6.) That the surrendered bonds would have no validity as against the defendant unless they were issued under an ordinance of the city, and unless it is shown that there was an ordinance of the city council authorizing the issue of the said surrendered bonds, the jury will find for the defendant."

6. The court erred in giving the following instructions on its own motion:

"The court is of the opinion, and so instructs you, that the bonds in suit issued by the defendant in lieu of said bonds on bank note paper—the last-named bonds having been originally issued under the circumstances above stated for valid debts against the city to other creditors of the city than the plaintiff, and the plaintiff not having been connected with their issue—constitute a valid ground of action against the city, and the city is liable thereon to the plaintiff, although the said city bonds on bank note paper were of such an appearance and of such a form as to be especially adapted to constitute a circulating medium,

and were, in fact, used in and about the city as a local circulating medium in lieu of money.

4. "There is also a claim against the city for the amount of certain city bonds on bank note paper surrendered by the plaintiff to the city at its request, for which the city issued no new bonds, but placed the amount of the bonds surrendered by the plaintiff and destroyed by the city to the credit of the plaintiff on the ledger of the city. The same principles of law apply to this claim as to the claim on the new bonds.

5. "Under the foregoing views there is no question of the statute of limitation in this case, although it is probable under the 'call' made by the city in 1875, and the action taken thereunder, this defence would in no event be available to the city, but it is not necessary to rule the point.

"Under these instructions you will find a verdict for the plaintiff for the amount of the new bonds issued in lieu of the bonds surrendered, and the amount placed to the credit of the plaintiffs on the ledger account of the city, which was introduced in evidence."

8. The court erred in allowing the bonds sued on to be read in evidence.

BRIEF OF ARGUMENT.

As all of these exceptions are connected with each other, we shall save time by discussing the whole matter as one subject.

History of the Legislation on this Subject.—One might infer from a random glance at the bill of exceptions that the issue of the city money was in some way attended with a strong suspicion of illegality. In one place this bill of exceptions says:

"The former mayor of the city testified that he was such when these bonds were issued; that it was thought that the city had not the right to issue notes engraved in the form of bank bills, but that the city attorney advised the council that if the paper was in the form of bonds, there would be no legal objection to it. It was under this advice that said bonds were issued." (Tr. 23.)

Hence it appears that the members of the council knew the law and deliberately sought to evade it.

The constitution of Arkansas of 1836 provided that the legislature might incorporate two banks, and that the faith and credit of the state might be pledged to carry them into operation. *Art. VII.* The State accordingly chartered two banks—the Real Estate Bank and the State Bank—soon after the constitution went into effect, and issued her bonds for the purpose of raising funds for a banking capital for these banks. The result was the common one. The banks failed after a brief and inglorious existence. The bonds remain unpaid. This calamity produced a great revulsion of sentiment. The first amendment to the constitution, ratified November 17, 1846, provided that "No banks or banking institution shall be hereafter incorporated or established in this State." Dig. 1858, p. 53.

As there was no authority for any one to issue any bills for circulation as money in the State, there was no home paper currency; and the legislature passed acts restricting the circulation in the State of bank bills issued in other States. With this explanation we shall now set out all the acts of the legislature bearing on the subject in the order in which they passed:

CHAPTER 119.

PRIVATE NOTES.

SECTION 1. No person or persons unauthorized by law shall intentionally create or put in circulation, as a circulating medium, any note, bill, bond, check or ticket, purporting that any money or bank notes will be paid to the receiver, holder or bearer, or that it will be received in payment of debts, or to be used as a currency or medium of trade in lieu of money.

SEC. 2. If any person or persons shall issue, put into circulation, sign, countersign, or endorse any such note, bill, bond, check, or ticket, he or she, or they, so offending, shall be indicted, and being thereof convicted shall be fined not less than fifty, nor more than three hundred dollars, and be imprisoned not exceeding twelve months.

SEC. 3. If any person or company vend, pass, RECEIVE or

offer in payment any such note, bill, bond, check or ticket, he, she or they, so offending, shall forfeit the sum of fifty dollars, to be recovered by action of debt, with costs, to the use of any person who will sue for the same before any justice of the peace of the county in which the party offending may be found.

SEC. 4. The preceding section shall not effect any note issued by any bank authorized by law in the United States, except notes for a less sum than five dollars.

Approved, November 25, 1837. In force, March 1, 1838.

Revised Statutes 1838, p. 647.

CHAPTER 24.

CHANGE TICKETS.

SECTION 1. The holder or owner of any change ticket, bill or small note issued for the purpose of change, or otherwise, shall have the right to sue the drawer, issuer, or endorser of such change ticket or tickets, bill or bills, or small note or notes, before any justice of the peace in this state.

SEC. 2. The justice of the peace before whom any suit may be brought, under the provisions of this act, shall, in all cases where he is satisfied that the defendant in such suit did draw, issue, sign or endorse the change ticket, bill or small note sued on, and that the same is not paid, forthwith give judgment for the plaintiff, for the amount of such change ticket, bill or note sued on, and shall forthwith grant the plaintiff an execution on the judgment, if the plaintiff require the execution.

SEC. 3. It shall not be any bar to any plaintiff obtaining a judgment on any change ticket, bill, or small note, on account of any conditions specified or set forth in any change ticket, bill or note sued on, that payment will be made when the sum of five dollars is presented, but the justice shall give judgment for the amount of the change ticket, bill or small note sued on.

SEC. 4. The justice before whom any judgment may be obtained, by the provisions of this act, shall not grant or allow any appeal, or stay of execution, nor shall the defendant be permitted or allowed to have any stay of execution, appeal, certiorari,

writ of error or injunction, but shall abide the judgment of the justice.

SEC. 5. The Act passed at this session of the Legislature, entitled, "An Act to Prevent the Circulation of Private Notes in this State," approved November 25, 1837, shall take effect and be in force from and after the first day of March next.

Approved and in force, February 14, 1838.

Rev. Statutes 1838, page 175.

ACT OF DECEMBER 17, 1838.

SEC. 9. It shall not be lawful for any city, town, or corporation, whatever, within the State of Arkansas, to issue small bills or notes, commonly denominated change tickets or shin-plasters, unless specially authorized by law.

SEC. 10. All persons, officers of such city, town or corporation, or others, whose names shall be affixed to any such bills, notes, change tickets, or shin-plasters, issued in violation of this act, shall be individually responsible for the same.

SEC. 11. The holders of any such bill, note, change ticket, or shin-plaster, issued in violation of this act, may sue for and recover in gold or silver, the amount for which they purport to be payable, from the individuals whose names shall be affixed thereto, before any justice of the peace residing in the city, town or county in which the same may have been issued; and the decision of the justice, in all such cases, shall be final.

SEC. 12. The provisions of this act shall be construed to extend to all small bills, notes, change tickets, or shin-plasters, heretofore issued by any city, town, or corporation, unless the same be redeemed by the first day of May, 1839.

Act of December 17, 1838.

Digest 1848, p. 247.

AN ACT TO RESTRAIN THE CIRCULATION OF CHANGE TICKETS.

SECTION 1. *Be it enacted by the General Assembly of the State of Arkansas*, That it shall not be lawful for any person or per-

sons to put in circulation, sign, countersign, or endorse any bill, bond, note, check or ticket of less denomination than *five dollars*, with an intention that the same shall pass as currency, and that no person or persons, or company, shall, within this State, receive, vend, pass, or offer in payment, any bank note, bill, bond, check or ticket of a denomination less than five dollars, and intended to be used in circulation as a currency, whether the same were first issued in this State or not.

SEC. 2. *Be it further enacted*, That a violation of any of the provisions of this act shall be a misdemeanor, punishable in any of the circuit courts of this State by presentment or indictment, and the party offending, upon conviction, shall be fined in any sum not less than five nor more than five hundred dollars, at the discretion of the jury.

SEC. 3. *Be it further enacted*, That it shall be the duty of the several judges of the circuit courts to give this act in charge to the grand jurors at each circuit court, and that this act take effect from and after the first day of January, A. D. 1856.

Approved 8th January, 1855.

Acts 1854, p. 107.

ACT OF FEBRUARY 8, 1859.

SEC. 751. It shall not be lawful for any person to put in circulation, receive, pass, sign, countersign, or endorse, any bill, bond, note, check, or ticket of a less denomination than twenty dollars, with an intention that the same shall pass as currency; and no person or company shall, within this State, receive, vend, pass, or offer in payment, any bank note, bill, bond, check, or ticket of a denomination less than twenty dollars, and intended to be used in circulation as currency, whether the same was first issued in this State or not; *Provided*, that nothing herein shall be so construed as to prevent the circulation of negotiable paper or county warrants.

SEC. 752. A violation of any of the provisions of this act shall be a misdemeanor, and the party offending, upon convic-

tion, shall be fined any sum not less than fifty nor more than five hundred dollars for each and every offence.

Act of February 8, 1859.

Digest 1874, p. 257.

No. 56.

AN ACT to Repeal all State Laws that Prohibit the Circulation of Bank Bills of any Denomination.

Be it enacted by the General Assembly of the State of Arkansas, That all acts or parts of acts, prohibiting the circulation of bank bills of any denomination or amount, and fixing a penalty for such circulation, be, and the same are hereby repealed, but nothing herein shall be construed so as to authorize the issuance or circulation of shin-plasters, change notes or other irresponsible paper, by individuals, corporations or others.

Approved, November 18, 1861.

No. LXXVI.

AN ACT to Prevent Discrimination in County Warrants or County Scrip.

Be it enacted by the General Assembly of the State of Arkansas:

SECTION 1. That all county warrants and county scrip shall be receivable for any taxes for county purposes, except for interest on the public debt and for sinking fund, and for all debts due the county by whose authority the same was issued; and all city warrants, scrip, acceptances, or money, shall be receivable for any taxes for city purposes, except for interest tax, and for all debts due the municipal corporation by whom the same were issued, without regard to the time or date of issuance of such warrant, scrip, acceptance, or money, or the purpose for which they were issued; and it is hereby made the duty, and authority is hereby conferred upon the county court of the respective counties, or the judge thereof in vacation, to make all needful orders, compelling collectors, both county and municipal, to comply with the provisions and intent of this act. *Provided,* that nothing in this act shall authorize the collector to receive

scrip issued since the adoption of the constitution, in payment of the tax levied to pay the indebtedness existing before the adoption of the constitution.

SEC. 2. That all laws and parts of laws in conflict herewith be, and the same are hereby repealed, and that this act take effect and be in force from and after its passage.

Approved December 14, 1875.

It was contended on the trial that the act of November 18, 1861, had the effect to make valid the city money issued by the city of Little Rock. The court, however, did not indulge that opinion, and, indeed, could not, as the act contained an express reservation of paper issued without legal authority.

The three acts first cited above, namely: those of November 25, 1837, February 14, 1838, and December 17, 1838, remain on statute book to-day, having never been repealed. *Dig.* 1874, p. 256.

Regarding this kind of paper they forbid:

1. Its creation.
2. Putting it in circulation.
3. Its issuing.
4. Its signing.
5. Its countersigning.
6. Its endorsement.
7. Vending it.
8. Passing it.
9. *Receiving it.*
10. Offering it in payment.

The second statute provided that the drawer, issuer or endorser of any such paper should be liable to be sued for the nominal amount thereof.

If the officers of a city make such paper without any authority of law, *they* would be the drawers, issuers or endorsers thereof, and not the city, because their unlawful acts would not bind the city in its corporate capacity.

It is true that the legislature might possibly say that the officers of a city should not do a certain thing, but that if they did it, the city should be bound by it. This, however, would be very strange and absurd legislation: saying in the same breath that the officers should have no power to do that thing; but that if they did it, then they should have that power—a power obtained by a violation of law. The laws are doubtless sufficiently involved without supposing the legislative mind to run in such eccentric grooves. But in this case express provision is made by the act of December 17, 1838, that the officers of the town or city in such case shall be individually liable on the paper. The mention of one thing excludes the presumption of another; and there is nothing anywhere in the acts from which any one could infer that the legislature ever intended to give the towns and cities of the state banking privileges in such a curious way. It is possible that sunbeams may be extracted from cucumbers; but how hopeless, when we come to think of it, is the task of obtaining an implied grant of power out of an expressed prohibition of that very power; and yet that is just what has been accomplished in this case.

But—to examine the question more closely—we contend that the city money was void because twice, at least, this court has said that municipal corporations "can exercise no power which is not in express terms, or by fair implication, conferred upon them."

Thompson v. *Lee County*, 3 *Wall.*, 331.
Thomas v. *City of Richmond*, 12 *Ib.*, 353.

And in this last case the court applied the remark to this very matter of the issue of bills by municipal corporations for circulation as money.

The Issue of the Bonds to be Used as a Circulating Medium was Forbidden by Statute.

We have seen what the statutes are. They could not be more explicit. The prohibition of an act makes every contract in violation of the prohibition illegal. "Where a statute expressly forbids an act, the decisions are uniform that a contract founded

on a violation of the enactment cannot be enforced." *Metc. on Cont.*, 259.

"It has long been settled that a promise made in consideration of an act which is forbidden by law is void." *Craig* v. *State of Missouri*, 4 *Pet.*, 436.

We may, indeed, go so far as to say that if there had been no statute on the subject, the issue of the city money would have been illegal. This court has said:

"The issue of notes as a common currency, or circulating medium, is guarded with much jealousy by all goverments as touching one of its most valuable prerogatives, and as deeply affecting the common good of the people. Almost every State has stringent laws on the subject, and it may be said to be against the public policy of the country to allow individuals or corporations to exercise this prerogative without express legislative sanction."

Thomas v. *City of Richmond*, 12 *Wall.*, 353.

And any contract in violation of the public policy of the State is void.

Groves v. *Slaughter*, 15 *Pet.*, 503.

Bank of Kentucky v. *Adams Ex. Co.*, 93 *U. S.*, 174.

We hardly know whether the notion that the illegal acts of the officers of the city would bind the city, though, of course, quite out of the scope of their authority, was spontaneous with the court below or not. In delivering the charge, the court said, in referring to the act of December 17, 1838:

"Since the legislature chose to pass this special act relating to municipal corporations, it may be said the supreme court erred in deciding that corporations were included in the original act. But as between the legislature and the supreme court, the latter is the proper and best interpreter of the meaning of previous acts of the legislature, and, besides, this last act had been passed and in force three or four years before the case of Van Horne v. the State was decided." (Tr. 33.)

And yet the amount of persuasiveness there is in the decision of *Van Horne* v. *State*, 5 *Ark.*, 349, must be pronounced to be of such a character as to be quite imponderable.

Van Horne's case was a criminal case decided in 1843. Van Horne was indicted for making the "counterfeit resemblance and imitation of certain notes and instrumentss which circulated by usage as currency, at the time of said forgery, *purporting* to be of the corporation of Little Rock." It was objected that the paper thus described was illegal, and that hence it was not a crime to forge imitations of that paper. The judge delivering the opinion, went into an argument to show that the word "person" includes corporations, overlooking the fact that the word in question is not found in the acts referred to; and hence concluded that the issue of the paper mentioned in the indictment was illegal, entirely overlooking the act of December 17, 1838, where express provision was made to prevent the issue of such paper by municipal corporations; that act being then smothered in the annual pamphlet publication, and the court looking no further than the digest of the statutes. The court held that the indictment was valid under the Arkansas statutes, because it was "wholly immaterial whether the forgery be of a bill genuine or binding on the corporation" or not. *P.* 353.

This was the decision of the court, and it settled the case; but in the course of the opinion delivered, the judge said: "It is certainly unlawful for any corporation to issue change tickets; and it is equally true that if they do, the corporation is liable for the amount of such issues, and forfeits the sum of fifty dollars for passing or receiving them." *P.* 352.

The laxity and obliviousness of the whole opinion are things remarkable; and it would be hard to find any *dictum* more unmixed, or looser, or more spasmodic than that in question.

In *Yeates* v. *Williams*, 5 *Ark.*, 684, the question came before the court whether a note given in consideration of notes issued for circulation as money, in violation of the statute, would support an action; and the court held that it would not. In deciding that case, the court made use of this emphatic language:

"In respect to this matter, the statute is clear and explicit. The legislature intended to out up by the root, all individual paper emissions of money, and in order effectually to accomplish

this desirable and important end, they have declared, that whosoever executes or passes such a spurious currency, shall be liable criminally for such offence; and that the maker of this kind of currency shall be civilly answerable by an action for the recovery of the amount, and it utterly forbids its execution and circulation by any one. The true intent of the law was to prevent by every possible means, the utterance and circulation of such a currency. Its policy was just and wise. This can only be done by construing the act liberally."

We should think that deference by the federal courts to a mere unfounded *dictum* of a state judge would be an excess of comity. But *Van Horne* v. *State* did not stand alone.

While the council of Little Rock were appealing to future and more enlightened generations, tax-paying citizens resolved to appeal to the courts to prevent the issue of the illegal paper. Jones, on behalf of himself and the other tax-payers of the city, applied for an injunction. The report of the case, *Jones* v. *City of Little Rock*, will be found in *25th Ark.*, p. 301. The bill in that case proceeded on the ground that the tax-payers might be held liable for the redemption of the paper, and counsel for the plaintiff cited *Van Horne* v. *State* as furnishing ground for that fear. The court decided that the plaintiff showed no cause of action, saying: "There is no allegation that he will be compelled to accept such bonds or notes for any city liability, or that he must receive such currency in trade, or suffer by refusing to do so." Then the court decided that the issue of the city money or bonds was void, both as being unauthorized and as being prohibited, and said that "if issued in violation of a positive statute *they are void; and the taxable property of the citizens cannot be held liable for their redemption.*"

It was with this quieting assurance, in lieu of a remedy, that the tax-paying citizen, who had exhausted all legal means of defence against an unlawful exercise of power, was advised to possess his soul in peace. Now, by the judgment of the court below, he is told that he is liable to redeem, not the illegal paper referred to, indeed, but other and more onerous paper merely

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It was with this quieting assurance, in lieu of a remedy, that the tax-paying citizen, who had exhausted all legal means of defence against an unlawful exercise of power, was advised to possess his soul in peace. Now, by the judgment of the court below, he is told that he is liable to redeem, not the illegal paper referred to, indeed, but other and more onerous paper merely

slipped in its place. What must the tax-paying citizen think of the law, and its inscrutable mysteries? and who could blame him, under these circumstances, if, bewildered by intricacies which he cannot comprehend, he should conclude that the courts are to be

> "——— no more believed
> That palter with us in a double sense;
> That keep the word of promise to our ear,
> And break it to our hope."

It is true that the court below mentioned what was said in that case on this subject as a mere *dictum;* but we do not so understand it. The abstracts of the brief printed in the report show that the question as to the liability of the city on the paper was the only point discussed by counsel. It is true that the court said that Jones did not appear to be individually injured by the issue of the paper in question; but then the court proceeds to show that the reason he cannot be injured is, because the issue of the paper is a mere void act, which can never import any obligation on the part of any tax-payer. We understand a dictum to be a judicial opinion expressed by a judge on a point not within the scope of the decision. The right of Jones to bring the suit as connected with his alleged interest in its subject matter was at the very bottom of any inquiry that was had.

But since this case was heard in the court below, the whole question has again been presented to the supreme court of Arkansas in the case of *Lindsay* v. *Rottaken*, 32 *Ark.*, 620, in which all the statutes and decisions on the subject were carefully examined, the court arriving at the conclusion that the issue of the city money was illegal, and that the city money itself was void for such illegality, and is not binding on the city. The court say that the contrary dictum in *Van Horne* v. *State* was an error. The opinion is an instructive one and will bear the closest scrutiny, both for legal reasoning, and for the authorities cited. In it the court also dispose of the argument that the act of December 14, 1875, entitled "An Act to Prevent Discrimination in County Warrants or County Scrip," was intended to validate this city money; saying, pertinently enough, that if the act had that effect, it would validate all spurious county scrip whatever.

One of the most striking features of the charge of the court below in the case now at bar is that portion of it in which the learned judge speaks of the plaintiff as being an *innocent holder* of the city money, and as having had nothing to do with its issue. This same view was urged in *Lindsey* v. *Rottaken*, and in reply the court said:

"It is sufficient to say of this that there can be no innocent holder of paper issued by a municipal corportion without power or in violation of law." P. 634. On this point the court cite various familiar cases decided by this court, and Dillon on Municipal Bonds.

On this point the court might have also referred to *Thomas* v. *City of Richmond*, 12 *Wall.*, 356, where it was held that if the statute forbids the *receiving* of the paper illegally issued, *or* if the illegal paper is issued by a public corporation, the holder of the paper is *in pari delicto* with the maker, and cannot sue on the paper, or the original consideration for which it was issued. The plaintiff in this case could then have no standing in court at all. In the language of this court:

"The only material question was whether or not the plaintiff was *particeps criminis?* If he was, he was disabled under the maxim to recover. The law leaves the party thus situated where it finds him. If either has sustained loss by the bad faith of his associates, it is but a just punishment for the illegal adventure."

Brown v. *Tarkington*, 3 *Wall.*, 381.

That the plaintiff below was *particeps criminis* in this case was decided on facts precisely similar in *Thomas* v. *City of Richmond*, on two distinct grounds. There is nothing hard or unreasonable in this result. "The currency measure all values, and is the medium directly or indirectly of all exchanges. To keep it sound, and to guard it as far as possible from fluctuations, are among the most imperative duties, and among the most difficult problems of government."

Davidson v. *Lanier*, 4 *Wall.*, 454.

The decision in *Lindsey* v. *Rottaken* being that of a state court of last resort, in construction of a State statute, is necessarily

conclusive as far as it goes. It decides that the city money was illegal, and that the city was in no way bound for it, in strict accordance with the decision of this court in *Thomas* v. *City of Richmond*, where the facts and legal questions were identically similar. This takes away the whole ground of the charge of the court below; for in that charge the court did not impute any particular efficacy to the act of the council in calling in the city money and giving new bonds or assumpsits in lieu thereof, though it was contended that this renewal of the paper and promises purged the sin of the city money, and made a new and valid claim against the city, having relation around the city money by ellipsis, to the original claims first paid by the city money. The court seemed to glance in that direction, regretfully dwelling on the fact that the city money was first paid out for building school-houses, etc., forgetful of the fact that the city money had probably and presumptively been returned to the city treasury and re-issued many times, so that no one could tell what it was last issued for, or whether it was issued for a good claim or a bad one. But the court was arrested by the ruling in *Thomas* v. *City of Richmond*, that the receiver of the illegal paper, having received it in violation of public policy and of express statute, could not in any manner claim as equitable assignee of the original demands against the city for payment of which the city money was at any time issued.

How wholly unauthorized was the issue of the city money in the form of bonds may be seen further by reference to "An Act to reduce the law incorporating the city of Little Rock, and the several acts amendatory thereof, into one act, and to amend the same," approved December 12, 1866. *Acts* 1866-7, *p.* 21.

Section 14 provided:

"That upon the passage of all bills imposing taxes, increasing licenses or abolishing licenses, and of all bills borrowing money, the yeas and nays shall be entered on the journal."

Section 16 provided:

"That the city council shall have power within the city *by ordinance:*

* * * * * * * *

"To borrow money on the credit of the city, and issue bonds for the payment of the same."

At the time of the proceedings to issue the bonds on bank note paper there was no other authority to issue bonds than that contained in the extract above copied. The members of the council knew that they were acting without authority of law and in violation of law, and they took counsel with the city attorney in order to find some way to evade the law. As usual, the unlawful act was fruitful of attempted evasions. The bank, the plaintiff below, received and paid out the city money daily, but at one per cent. below, seeking thereby to evade the internal revenue laws of the United States leving a tax on the circulation of such paper. *Sec.* 3412, *Rev. St. U. S.*

Looking at the whole matter one must be at a loss to know in what sense the word "innocent" was used by the court below as applicable to the plaintiff. It would seem, however, that the court conceived that there was a material difference between one who starts the game and one who only comes in at the death. It is, however, needless to say that in the law the word "innocent" cannot be properly applied to a merely supposed inferior degree of guilt. Some metaphysical and refined distinction of this kind was attempted by the lower court in *Hanauer* v. *Doane*, 12 *Wall.*, 344; but this court declined to support the nice and fallible discrimination of motives that would be necessary to uphold or even perceive that distinction. But in this case no such distinction is within the reach of the clearest vision of the law. In *Thomas* v. *City of Richmond* it was solemnly adjudicated that, under a statute similar to that in question here, the receiver and the makers of the illegal paper are in PARI *delicto*.

At the time of the issue of the bonds sued on there was no other authority than that contained in the following statute:

"The city or town council of any city, or town, for the purpose of extending the time of payment of any indebtedness heretofore incurred, and which, from the limit of taxation, such city or town is unable to pay at its maturity, shall have the power to issue the bonds of such city or town, or borrow money, so as to

change but not increase the indebtedness, in such amounts, not less than fifty dollars, and for such length of time and at such rate of interest, not more than ten per cent. per annum, as such city or town council may deem proper; and when such bonds shall have been issued, a tax shall be assessed and collected sufficient in amount to provide a sinking fund for their final redemption, as provided in the next section."

Dig. 1874, *sec.* 3298.

Under the constitution of 1868 there could be no usury law. *Dig.* 1874, *p.* 61. By the present constitution, in force from October 30, 1874, it is provided that "all contracts for a greater rate of interest than ten per centum per annum shall be void." *Art. XIX, sec.* 13.

The city council in its liberality, not only took up the spurious city money, but actually increased the amount of the proposed burden by raising the interest from eight to ten per cent. per annum. This, we submit, could not be done under the statute, even if the city money had been valid.

It would seem to follow, as a matter of course, that if the city money was issued in violation of law, any act in furtherance of that design, as the giving of new bonds or promises for it, would be tainted with the same illegality; and that such new bonds or promises would be void. The court below did not announce any contrary view, but counsel insisted on an opposite doctrine, as being supported by the opinion delivered by Dillon, C. J., in *Clark* v. *Des Moines*, 19 *Iowa*, 227, where, indeed, something of the kind was held. As this decision remains altogether lonely and isolated, having neither companion, predecessor nor successor of its kind, we shall give the defendant in error the benefit of an extract from the opinion, showing the reasoning upon which it proceeds:

"Unless corporations," says the learned judge, "are exempt from the ordinary principles of fair dealing that apply between man and man, this defence has no just foundation. It is the duty of the courts not to allow the honest and just merits of a cause to be entangled in the meshes of sophistical reasoning and rules purely technical. Not a member of the city council would,

we are persuaded, make such a defence for himself. We have multiplied and constantly recurring examples of the fact that under the shield of their corporate character men daily do acts which they never would do as individuals. Nor are these dangers confined to this side of the Atlantic. 'It is a familiar fact,' says Mr. Herbert Spencer, 'that the corporate conscience is even inferior to the individual conscience; that a body of men will commit, as a joint act, that which every individual of them would shrink from did he feel personally responsible.'"

Admitting, as the court did in that case, that the city money was bad as issued in violation of law, and consequently without any power, it certainly sounds strange to hear it said that the council could make their past void act good by a simple ratification; acquiring power, it would seem, by repeatedly endeavoring to do that which the law had condemned. *Vires acquirit eundo.* Of what avail would the statutes be, if they could be evaded in that way? This would remind one of a celebrated English statute, of which it was said that its only effect was to add three words to instruments of conveyance.

We may admit that the corporate conscience is bad. In this case the defective sensibility of conscience was manifested by the councilmen of Des Moines who exceeded their powers. This was wrong. Can it be seriously contended that it was the moral duty of the citizens to ignore that wrong, and hold themselves precluded by the illegal act? If such were the case, and the courts should enforce this moral obligation, of what avail would be the limitations on the powers of officers governing public corporations? Evidently they might do as they pleased, and it would be a sin in any citizen to impede the full effect of any of their acts.

The result of this rule would doubtless be about this: The spurious paper, having circulated at par for awhile, would fall in value to a very low per cent. The loss would fall on the common people who do not usually have time to forecast financial storms. Men of means would then buy up the paper at nominal prices, get a novation, and have taxes levied on the common peo-

ple to redeem the paper; and thus the latter unfortunate class would twice lose the nominal value of the paper, or nearly so.

In support of this doctrine the opinion in *Clark* v. *Des Moines* cites *Mullarky* v. *Cedar Falls*, 19 *Iowa*, 21, which is nowise in point. Also *Allegheny City* v. *McClurkan*, 14 *Penn., St.* 81, the only case we believe where it was ever held that a public corporation is liable on paper illegally issued by its officers; the decision being based expressly on the ground that the statute had made that singular provision; the court conceding that in the absence of such a statute the rule would have been different. *Early* v. *Mahan*, 19 *Johns*, 147, is also cited. That was a case of two private persons, perfectly *sui juris*, who, by a new agreement, purged the usury of a previous loan. Of course the doctrine of *ultra vires* was neither mentioned nor thought of in such a case. No other case is cited.

It may be seen at a glance that the decision in *Clark* v. *Des Moines* must be abandoned. If the city council had no power to issue the paper, it had no power to ratify the act. "In other words, it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made." *Cook* v. *Tullis*, 18 *Wall.*, 338. The second action of the council could not rise any higher than the first. *Ex nihilo nihil fit.*

We observe that although *Clark* v. *Des Moines* is several times cited in Dillon on Municipal Corporations, yet it is not cited in support of the doctrine here mentioned; nor is such a doctrine even hinted at. Instead thereof the author uses the following judicious and highly commendable language:

"The general principle of law is settled, beyond controversy, that the agents, officers, or even city council, of a municipal corporation, *cannot bind the corporation* by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, or which—not being in terms authorized—is against public policy. This doctrine grows out of the nature of such institutions, and rests upon reasonable and solid grounds. The inhabitants are the corporators—the officers are but the

public agents of the corporation. Their duties and powers are prescribed by statute or charter, which all persons not only may know, but are bound to know. The opposite doctrine would be fraught with such danger, and accompanied with such abuse, that it would soon end in the ruin of municipalities, or be legislatively overthrown. These considerations vindicate both the reasonableness and necessity of the rule that the corporation is bound only when its agents or officers, by whom it can alone act, if it acts at all, keep within the limits of the chartered authority of the corporation. The history of the workings of municipal bodies has demonstrated the salutary nature of this principle, and that it is a part of true wisdom to keep the corporate wings clipped down to the lawful standard. It results from this doctrine that unauthorized contracts are void, and in actions thereon the corporation may successfully interpose the plea of *ultra vires*, setting up as a defence its own want of power under its charter or constituent statute to enter into the contract."

Dill. Mun. Corp., sec. 381.

And on this general subject we beg leave to call the attention of the court to *Zottman* v. *San Francisco*, 20 *Cal.*, 96, which is a leading case on the subject.

The decisions of this court on the subject of novations of illegal contracts have been very clear and conclusive.

"Where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it, and if the contract be in fact only connected with the illegal transaction, and growing immediately out of it, it is equally tainted by it."

Armstrong v. *Toler*, 11 *Wheat.*, 278.

"A transaction originally unlawful cannot be made any better by being ratified."

United States v. *Grossmayer*, 9 *Wall.*, 75.

In *Hanauer* v. *Woodruff*, 15 *Wall.*, 443, suit was brought on a note given for Arkansas war bonds. The court said:

"The contract expressed by the note is indeed collateral to that upon which the bonds were issued; that is to say, it is not

the same but a different contract. Yet it is connected with that contract by the fact that the bonds constitute its consideration; it therefore gives value and currency to those bonds, and to that extent advances the purpose for which the bonds were issued. It thus draws to itself the illegality of the original transaction."

In *Hanauer* v. *Doane*, 12 *Wall.*, 345, there had been a novation of the evidences of the debt; but the plaintiff was not allowed to recover.

In *Davidson* v. *Lanier*, 4 *Wall.*, 455, the court, in speaking of an act regulating the issue of bank paper, said:

"We must construe the act, therefore, as covering with its penal prohibition the whole range of devices by which illegitimate currency is imposed on the community. It prohibits the use of such currency during the whole period of the establishment of an illegal company, and applied as completely to the last as to the first step of its operations. Any other construction would frustrate the legislative intent, and leave the great mischief, which the statute was made to prevent, wholly without restraint or check."

In another case this court said:

"To the argument of the counsel for the plaintiff—that admitting the banking transactions to be illegal, yet that the settlement of the balance and giving notes for the same purged the new promise, as he calls it, from the original taint—the answer is, that the new promise is founded on the illegal consideration; a debt or demand growing out of the illegal transactions; and is as infirm, in the eye of the law, as the implied promise that existed previous to the giving of the notes."

Brown v. *Tarkington*, 3 *Wall.*, 381.

And in a later case the court used the following emphatic language:

"The instruction given to the jury, that if the contract was illegal the illegality had been waived by the reconventional demand of the defendants, was founded upon a misconception of the law. In such cases there can be no waiver. The defence is allowed, not for the sake of the defendant, but of the law itself.

The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, *ex dolo malo non oritur actio*, is limited by no qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

Coppell v. *Hall*, 7 *Wall.*, 558.

It only remains for us to say that under the plea of *non est factum* there was no foundation laid for the admission of the bonds in evidence.

If the decisions either of this court or of the court of last resort of the State, in the construction of State statutes, are entitled to any respect, it is transparent that this case was wrongly decided. But in order to make the error of the court below perfectly glaring, it is only needful to notice one sentence in the charge or summing up of the court, which was the turning point of the decision. We refer to page 125 of the record, where the court used this language:

"I cannot say that these decisions are conclusive in settling this statute; but is clear to my mind that although *this paper was issued in violation of law*, the legislature did not intend that the *innocent holders* (?) of such paper should be held liable to *all* of the penalties imposed on *those* who receive it by the terms of the first act."

We cannot tell in what sense the expression "innocent holders" was used. The statute makes no exception in favor of any kind of holder. Certainly it was not intended to refer to the commercial law for a definition. By that law the plaintiff could not have been an innocent holder. Besides, the court decided

that the illegal character of the paper was visible on its face. The question naturally arises, "If the plaintiff was innocent, who could be found guilty?" If any such view is correct, it is plain that this court committed a grave error in *Thomas* v. *City of Richmond.*

Respectfully,

U. M. ROSE,
For Plaintiff in Error.

No. _____

SUPREME COURT

OF THE UNITED STATES.

In Error to the Circuit Court for Eastern Dist. of Ark.

BRIEF FOR PLAINTIFF IN ERROR.

THE CITY OF LITTLE ROCK, *Plaintiff in Error,*

—vs.—

THE MERCHANTS' NATIONAL BANK OF LITTLE ROCK, *Defendant.*

U. M. ROSE,

Attorney for Plaintiff in Error.

IN THE

SUPREME COURT

OF THE UNITED STATES.

THE CITY OF LITTLE ROCK, *Plaintiff in Error.* vs. MERCHANTS' NATIONAL BANK. OF LITTLE ROCK, ARKANSAS, *Defendant in Error.*	*In Error to Circuit Court. for the Eastern District of Arkansas.*

BRIEF FOR PLAINTIFF IN ERROR.

IN REPLY.

BY U. M. ROSE.

Since the preparation of the brief in this ca
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BRIEF FOR PLAINTIFF IN ERROR.

THE CITY OF LITTLE ROCK, *Plaintiff in Error,*

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THE MERCHANTS' NATIONAL BANK OF LITTLE ROCK, *Defendant.*

U. M. ROSE,

Attorney for Plaintiff in Error.

IN THE

SUPREME COURT

OF THE UNITED STATES.

THE CITY OF LITTLE ROCK, *Plaintiff in Error.* vs. MERCHANTS' NATIONAL BANK. OF LITTLE ROCK, ARKANSAS, *Defendant in Error.*	*In Error to Circuit Court. for the Eastern District of Arkansas.*

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IN REPLY.

BY U. M. ROSE.

Since the preparation of the brief in this case for the plaintiff in error, the report of the decision in *Hitchcock* v. *Galveston*, ~~T. C~~. U. S., has been published.

Regarding that case: Clearly there is no conflict between it and *Thomas* v. *City of Richmond*. The court make particular mention of the fact, that the issue of the bonds by the City of Galveston was not forbidden. This constitutes the essential difference between the two cases above mentioned. In the Galveston case no bonds were issued,

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and those persons who had done a part of the work contracted for, and who had been prevented by the City from completing it, sued for the value of that work.

"The test as to whether a demand connected with an illegal transaction be capable of being enforced, is whether the plaintiff requires to rely on such transaction in order to establish his case."

2 Chitty Cont., 972.

This well known rule is said by this court to be rather too narrow.

Hanover v. *Woodruff*, 15 Wall., 443.

It is only by reason of the claim that the defendant in error makes as a former illegal *receiver* of the illegal paper that it could have any pretence of right or remedy. Whatever demand it makes is by, or through, that medium.

The other points made in the brief, for defendant in error, seem not to require further discussion.

Respectfully,

U. M. ROSE,

For Plaintiff in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE CITY OF LITTLE ROCK, *Plaintiff in Error,* vs. MERCHANTS' NATIONAL BANK, OF LITTLE ROCK, ARKANSAS, *Defendant in Error.*	IN ERROR TO CIRCUIT COURT FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

BY

JOHN McCLURE.
T. D. W. YONLEY.

LITTLE ROCK:
W. H. WINDSOR, PRINTER AND BOOKBINDER.
1878.

IN THE

Supreme Court of the United States

THE CITY OF LITTLE ROCK, *Pl'ff. in Error*,
vs.
THE MERCHANTS NATIONAL BANK OF LITTLE ROCK, ARKANSAS, *Def't. in Error*.
No. 714.

BRIEF AND ARGUMENT OF THE DEFENDANT IN ERROR.

The first question arising in this case is: *Does the Bill of Exceptions present any point or question which this court can consider?*

It seems to us, that this case comes within the rule laid down in *Beaver v. Taylor et al.*, 3 *Otto. U. S.*, 46. In the case alluded to, Justice Hunt said:

"Before the case was submitted to the jury, the plaintiff requested the court to charge, as set forth by him, in eight several propositions. The court declined to charge, as requested, but charged, in its own language, and fully upon the case as presented by the evidence.

"The plaintiff excepted to the refusal of the court, and excepted, also, to so much of the charge as was in conflict with, and variant from, the several propositions presented

by him. It is upon this presentation of the case that this court is asked to reverse the judgment entered on the verdict.

"1. The *entire* series was presented *as one request;* and, if any one proposition was unsound, an exception to a refusal to *charge the series* cannot be maintained.

"2. If the entire charge of the court is excepted to, in gross, and any portion thus excepted to is sound, the exception cannot be sustained.

"3. An exception to such portion of a charge, as are variant, from the request made by a party, not pointing out the variances, cannot be sustained.

"For these three reasons, the bill of exceptions fails to present any point we can consider."

In *Johnson v. Jones*, 1 *Black.* 220, and in *Rogers v. The Marshal*, 1 *Wall.*, 654, it was held to be "well settled, that if a series of propositions be embodied in instructions, and the instructions are excepted to, *in a mass*, if any one of the propositions be correct, the exception must be overruled."

It appears, affirmatively, from the bill of exceptions filed herein, that the plaintiff in error presented eight instructions, *as one request*, and that to the refusal "to give *each*, the defendant, at the time, excepted." The bill of exceptions states:

"The defendant asked the court to charge the jury as follows:" [Then follows the eight instructions asked by the plaintiff in error.] Continuing, the bill of exceptions states that:

"The court refused to give any or either of said instructions, and to the refusal *to give each*, the defendant at the time excepted. The court then, on its own motion, orally gave the following opinion and charge to the jury:" [Then follows the charge given by the court.]

This language, as was the fact, shows that the exception was to the action of the court in refusing to give *all* the exceptions asked by the plaintiff in error, and not to a refusal to give some one of them.

The bill of exceptions also shows an exception to all that part of the charge beginning with the words "The court is of opinion, and so instructs you, that the bonds in suit, issued by the defendant, in lieu of said bonds, on bank note paper, to the end of said charge."

This exception embraces three out of the five instructions given by the court on its own motion, and is what may be called a "gross" exception. It is aimed at, and includes the concluding half of the third instruction and the whole of the fourth and fifth.

We are unable to distinguish this case from the facts and principle laid down in *Beaver v. Taylor et al.*, 3 *Otto.* 46. The entire series was presented, *as one request*, a portion of the charge is excepted to, *in gross*, and no attempt is made to point out wherein the court erred.

The question then to be determined is, is any one of the instructions asked, by the plaintiff in error, bad, and whether any one of the instructions given by the court, which was excepted to, by the plaintiff in error, is good?

Before proceeding to a discussion of the instructions

asked by the plaintiff in error, we deem it prudent to advise the court of the rule of practice prevailing in Arkansas, and the force and effect of the pleadings and the extent they dispense with proof.

The only pleadings allowed are:

"First—The complaint by the plaintiff.

Second—The demurrer, or answer by the defendant.

Third—The demurrer, or reply by the plaintiff.

Sec. 4558, *Gantt's Digest of Arkansas, p.* 810.

"There shall be no *reply* except on the allegation of a *counter claim*, or *set off*, in the answer.

Sec. 4579, *Gantt's Digest of Ark., p.* 813.

"Every material allegation of the complaint, *not specifically controverted by the answer*, and every material allegation of new matter in the answer, constituting a *counter claim, or set off*, not specifically controvered by the reply, must, by the purposes of the action, be taken as true. But the allegation of new matter, in the answer, *not relating to a counter claim or set off*, is to be deemed controverted, by the adverse party, as upon a direct denial, or avoidance, as the case may require.

Sec. 4608, *Gantt's Digest of Arkansas*, 816.

"*A material allegation*, in a pleading, is one essential to the claim, or defense, and which could not be stricken out without leaving it insufficient.

Sec. 4609, *Gantt's Digest of Ark.*, 816.

Attention is called to these provisions, to the end that it may be known that *evidence* is not required upon questions, or allegations, not put in issue, by the answer.

There being no counter claim, or set off, pleaded in this action, there is, of course, no reply, for, as will be seen, the code declares "the allegation of new matter, in the answer, not relating to a counter claim, or set off, is to be deemed controverted by the adverse party, as upon denial."

The several defenses set up by the plaintiff in error, are, in effect, pleas in abatement, and pleas in bar, and under our practice, these defenses admit the material facts alleged in the complaint, and their office is to avoid the legal result of the case made by the complaint, by means of the new matter therein set forth.

We understand the law to be, that where a party alleges facts in avoidance, the burthen of showing the facts relied on to avoid the state of case made in the complaint, is upon him who sets them up.

Bayley v. Tabor, 6 *Mass.*, 451.

Cuyler v. Sandford, 8 *Barb., N. Y.*, 225.

Brown v. Woodbury, 5 *Ind.*, 254.

Peck v. Hunter, 7 *Ind.*, 295.

Sec. 2494, *Gantt's Digest of Arkansas.*

Inasmuch as the relevancy of the instructions asked by the plaintiff in error, and refused by the court, have, in some instances, to be determined by the proof, or the absence of proof, and the issues made by the pleadings, no

further excuse for reference to the Practice Act of Arkansas is necessary.

The first instruction is: "The jury are instructed that on the whole evidence the defendant is entitled to a verdict."

This instruction was properly refused. It asserts no specific proposition of *law*. It is simply a request to the court, asking it to assume the province and functions of the jury.

Cook v. DuVall, 9 *Gill.*, (*Md.*) 460.

State v. Knight, 43 *Maine*, 11.

The second instruction is: "Unless the jury find, from the evidence, that the plaintiff received the warrants and other evidences of debt mentioned in the complaint as having been surrendered to the City for the obligations and promises sued on, as collateral security for loans, or in the payment of loans and discounts made by the plaintiff, they will find for the defendant."

The manner and mode of obtaining title by the defendant in error, was fully set out in the complaint, and *ownership* distinctly averred. Neither the manner of obtaining title nor the ownership, was put in issue by the answer.

The demand in the first cause of action is based upon negotiable paper, payable to the party therein named, or bearer, and the allegation is: "That the plaintiff is the lawful owner and holder of said bond," and that it is due and unpaid. In the 157th cause of action, the allegation is, "That on the 9th of October, 1874, it was the holder and

owner of $14,751 of the said bonds of the City of Little Rock," and that on a surrender of said bonds the said City, scorning to take any advantage of its creditors, or their assigns, who had received the same at par in payment of warrants, promised to pay, etc.

It is true, that by the first defense set up in the answer, the plaintiff in error says it has "no knowledge, information, or belief sufficient to found a belief upon, as to whether the plaintiff received the warrants and other supposed obligations, as collateral security for loans, or in payment of loans and discounts."

If this language was intended as a denial, or to put any material allegation of the complaint in issue, it fails in its object. The allegation of *how* ownership was acquired, so long as the owneship was not denied, was not a material allegation. If the manner of acquiring had been stricken out, the complainant would still have stated a cause of action.

The Code of Practice of Arkansas is, on the subject of pleading, a literal copy of that of Kentucky. In the case of *Corbin v. Commonwealth*, 2 *Met.*, (*Ky.*) 380, the answer alleged that the defendants "have no knowledge of any of the facts set up in the petition as the foundation of the plaintiff's claim, and no means of forming a belief, and therefore, deny them all, and require proof."

The question was, whether this language amounted to a denial of the facts set up in the complaint, and the court said:

"By the Civil Code it is provided that the answer shall contain a denial of *each* allegation of the petition, *contro-*

verted by the defendant, or of any information or knowledge thereof sufficient to form a belief. And every material allegation of the petition not *specifically controverted,* by the answer, must, for the purposes of the action, be taken as true."

There is no specific denial of the manner of acquiring the notes surrendered to the City, and none of the ownership of those sued on, nor of those surrendered, and the object of the instruction was to place the right of the defendant in error, to recover in this action, *not on the fact that the Bank did not own the bonds surrendered,* but that its rights were to be determined by the fact as to whether they had been acquired *as alleged in the complaint,* and this, too, in a cause where the manner of acquiring was *conceded by the pleadings,* and no evidence before the jury in conflict therewith. Such an instruction is clearly wrong, and ought to have been refused, as it attempted to form an immaterial issue.

The third instruction is: "It is conceded that the obligations and promises sued on, are based on the consideration of certain City Bonds on bank note paper, surrendered by the plaintiff to the City. As to these surrendered bonds the court instructs the jury that they will find for the defendant in case they find either of the following states of fact to exist:

"1. If the said surrendered bonds were issued for any other purpose than that of borrowing money.

"2. If the surrendered bonds purported that money would be paid to the receiver, holder or bearer thereof, with the intention that the same should be used as cur-

rency, or medium of trade in lieu of money, or if they were specially adapted for that purpose."

The prelude to the instruction assumes a "concession" which has not been made. It is nowhere "conceded" that the obligations sued on are based on the *consideration* of certain bonds on bank note paper, surrendered by the plaintiff to the City. The allegation in the complaint is:

"That all of said bonds issued by the defendant, in the hands of those receiving the same, and their assigns, represented the whole, or some portion of the amount of a *warrant* lawfully and legally issued by said City of Little Rock, * * * which said warrant was surrendered to said City on the reception from the treasurer thereof of the bonds so issued as aforesaid; * * * that the plaintiff on the 9th of October, 1874, surrendered and turned over to the City Council of said City an amount of bonds equal to $500, and that in exchange therefor he received the bond sued on; * * * that the bonds surrendered represented, at the time they were delivered, the whole or a fractional part of, a just indebtedness of the City of Little Rock, and no other consideration whatever.

The act under which the bonds sued on were issued, authorized "any town or city, for the purpose of extending the time of payment *of any indebtedness* heretofore incurred," to issue bonds. The City, as it had a right to do, and as was the fact, regarded the bonds surrendered as evidence of an unpaid debt. Before a bond could be issued under the act, the question had to be determined whether the evidence of debt, presented for bonding, was that of a debt "theretofore incurred." This question had to be de-

termined by the Council. It was determined in the affirmative, and ought not to be permitted to deny it now.

The *consideration* of the bonds sued on, is the *debt* which was evidenced by the *warrant* drawn on the treasurer, *and which had not been paid;* and when the court refused to give the instruction, it did right, for it assumed facts to exist and to be conceded, which were not.

Counsel cannot assume the existence of facts, in the court below, and ask a charge to the jury based on such assumption; nor, upon argument here, insist that because the assumption was made, this court is to consider the assumed facts as existing.

Jersey Life Ins. Co. v. Baker, 4 *Otto.*, 610.

The first proposition of law contained in the third instruction is: "If the said surrendered bonds were issued for any other purpose than that of borrowing money," they will find for the defendant.

What constitutes a "borrowing" of money is a question of *law*, and not a question of *fact*.

The bill of exceptions shows, and there is no dispute about the facts, that in 1867 the City Council caused $100,000 of bonds of the denomination of $1, 2, 5, 10, 20, 50 and 100, each to be prepared—that the bonds thus prepared were signed by the mayor and recorder of the City, and the seal of the City thereto attached, and that said bonds were payable in from one to ten years, with interest at eight per cent. per annum; that they were then deposited with the treasurer of the City, and were by him paid out on ordinary City warrants, drawn in the usual form, pur-

suant to the order of the City Council; that $3,500 was paid of these bonds for the lot on which the City Hall now stands; that $17,500 was paid for building a City Hall thereon; that $6,000 was used in paying over-due coupons on bonds of the City, issued under authority of law, to the Memphis and Little Rock Railroad; that $4,000 was used on the Peabody school house; that $6,000 went to pay the interest on the Memphis and Little Rock Railroad bonds; that $3,600 went to grade Markham street; $2,500 to grade Ferry street, and other amounts for the payment City officers, etc.

With these facts before the jury, the object of the instruction was to have it say whether these acts, and this use of bonds was a mode in which the "borrowing" power of the City could be exercised.

The issue of the "demand notes" by the general government, and the payment thereof to persons to whom it was indebted, was an exercise of the "borrowing" power of the United States. The issue of the "seven-thirty" notes, and their payment to creditors, was but a legitimate exercise of the "borrowing" power. The action of the government in the issue of the "legal tender" notes and the paying them out to its creditors was but an exercise of the "borrowing" power.

The action of the City of Little Rock, in issuing small bonds, and placing them in its treasury, and the paying of them out to its creditors on warrants properly drawn, and in payment of debts, is a legitimate exercise of the "borrowing" power of the City. There was no error, therefore, in refusing to submit to the jury the determination of a question of *law*.

If given at all, the third instruction would have had to have been given as an *entirety*, and if any one of the propositions were bad, it would not be error to reject the whole of it. We have already shown it assumes facts which are not admitted, and that the court was asked to submit a question of law to the jury.

But the instruction is wrong from another stand point. It ignores the fact that a city may make and execute its promissory note in payment of a debt which it has the right to contract.

We are aware of the fact that it is true, as a general proposition, a corporation can exercise no powers except such as the law confers upon it, or which is incident to its existence. If this rule be confined to cases where the corporations are claiming monopolies, or rights, in conflict with the rights of the government, or its grantee, the rule is correctly stated. But where no privilege is claimed in derogation of the public right, a different rule prevails.

To illustrate, the grant of power to "borrow money" and issue bonds in evidence of such borrowing, is not to be construed as a restriction or limitation on those powers which are incident to all corporations. Such a provision would not prevent or deprive the City from executing negotiable notes in payment of valid debts.

McMasters v. Reed's Exrs., 1 *Grant's Cases*, (*Pa.*), 48.

Kelly v. Brooklyn, 4 *Hill* (*N. Y.*), 263.

By this we do not mean to say that the City could issue what is called *commercial paper*, but we do claim that the

authority in the charter authorizing the "borrowing" of money, does not deprive the City of the power to execute promissory notes for work and labor, or any other just or valid debt which it had contracted in the lawful execution of its power. Hence, it would have been wrong to have instructed the jury that if they found the surrendered bonds were issued for any other purpose than borrowing money, they would find for the plaintiff in error.

The City, we apprehend, would have the right, in the absence of a provision in its charter authorizing it to borrow money, to issue bonds in evidence of its indebtedness, and use terms which import negotiability. We do not think this proposition is seriously disputed. Whether a city may issue bonds and give to them all the attributes of "commercial paper," is quite another question, and one which does not arise in this case.

The second proposition embraced in the third instruction, is wholly unintelligible.

"If the surrendered bonds *purported* money, would be paid to the receiver, holder or bearer thereof, *with the intention that the same should be used as a currency, or a medium of trade in lieu of money*, or if they were specially adapted for that purpose," they will find for the defendant.

No jury in christendom could ever arrive at the meaning of the first portion of the instruction. They may have "purported" that money would be paid to the holder or bearer, but in the nature of things it is not possible that they "purported" an "intention that the same should be used as a currency, or a medium of trade in lieu of money."

The concluding portion of the instruction is, "Or if they

were specially adapted for that purpose." This portion of the instruction reminds us of the Irishman who was convicted of having tools in his possession for making counterfeit money, against whom there was no evidence of use, who, when asked if he had anything to say why the sentence of the court should not be passed upon him, requested the judge to sentence him for an assault with intent to commit a rape. The court remarked there was no evidence of any such crime, and the Irishman replied: "Sure, I have got the tools." The *adaptability* of these bonds to be used as a circulating medium, is not the test.

In *Dively v. City of Cedar Falls*, 27 *Iowa*, 230, Judge Wright, in speaking on this very subject, says:

"That the members of the City Council may have contemplated, at the time of voting, that it might or would become a convenient circulating medium, would not make it money, nor its issue a violation of law, nor would the city be relieved from liability by the fact that the scrip was used by individuals, or the community generally, as a circulating medium.

In *Bank of Montgomery v. Crocheron*, 5 *Ala.*, 254, the Supreme Court of Alabama said:

"The *intention* with which the issue is made must enter into, and become, a part of every omission, and the act is lawful or unlawful, as the intention may indicate. Neither the *amount* of the obligation, its *shape*, manner of *engraving*, nor indeed any other circumstance of a similar kind, will render the emission a matter of law to be determined by the court, but the intention must be ascertained by the jury."

In *James v. Rogers*, 23 *Ind.*, 453, the Supreme Court of Indiana said:

"Neither the organic law nor the statutes forbid persons or corporations from issuing promissory notes, *and embellishing them with all the ornaments taste may tempt or skill devise.* * * * *The pictures on their face cannot make them void.*"

We think these authorities fully show that the "adaptability" of the bonds, to be used as currency, is not the rule by which the rights of the parties to this suit are to be determined.

In view of the fact that there is no evidence tending to show that the surrendered bonds were issued by the City, in the sense bank notes are issued, and in view of the fact that the same were issued to represent a *debt* and not a *credit*, we contend the third instruction was correctly refused.

The fourth instruction is: "If the jury find that the bonds surrendered bore interest at eight per cent., and that on the issue of bonds sued on, the interest of the old bonds was cast up, and the new bonds were given for the principal and interest thereof, and that the new bonds bear interest at the rate of ten per cent. per annum, the jury will find for the defendant as to the bonds sued on."

This instruction is based on Section 3298 of Gantt's Digest of the State of Arkansas (p. 620), and it is erroneous in this, that it ignores the right of recovery *on the common counts.*

The section alluded to is as follows:

"The City or Town Council of any City or Town, for the purpose of extending the time of payment of any indebtedness, heretofore incurred, and which from the limit of taxation, such City or Town is unable to pay at maturity, shall have the power to issue the bonds of such City or Town, or borrow money, *so as to change, but not increase the indebtedness*, in such amounts, not less than fifty dollars, and for such length of time, and at such rate of interest not more than ten per cent. per annum, as such City or Town Council may deem proper; and when such bonds shall have been issued, a tax shall be assessed and collected sufficient in amount to provide a sinking fund for their final redemption, as provided in the next section."

It is conceded by the bill of exceptions, and stated by Judge Dillon (see printed record, page 29), "that the new bonds were given for the principal and interest of the overdue bonds, on bank-note paper, and the amount credited on the ledger account is for like bonds, and for which new bonds were not issued."

The only question presented by the instruction is: Do the bonds sued on, on the ledger account, represent *an increase of indebtedness;* or, in other words, in the *change of the form* of the indebtedness, *was it increased?*

The evidence is that none but *over due* bonds were surrendered; that on these, interest was computed at eight per cent. per annum; that the interest thus found was added to the principal of the surrendered bonds, and new bonds given for the amount thus found due. The bonds being over due, the amount of the *indebtedness* was the amount

of the principal, with interest added. The instruction is not supported by evidence; on the contrary, is contradicted, and was properly refused.

The fifth instruction is: "That the burden of proof is on the plaintiff to show such a state of facts as would authorize the City to make the obligations and promises sued on, and the plaintiff is not entitled to recover, unless the jury are satisfied from the evidence that the bonds sued on were issued *for the purpose of extending the time of payment* of the paper for which the new bonds were issued."

This instruction is also based on section 3298 of Gantt's Digest of the State of Arkansas, being the same section referred to and set out at length in the objections to the fourth instruction.

The statute referred to shows an anthority, under certain circumstances, to issue bonds. The bond was read in evidence, and it recites that it was issued "under and in pursuance of section 3298 of Gantt's Digest of the Statutes of Arkansas, and is for indebtedness of said City, incurred before the passage of the act."

Under this recital the *presumption* is, that the bonds were issued in conformity with the act. The bond is the instrument declared on, and in the absence of a denial, it is *prima facia* evidence of what it purports to be, the bond of the City. If there be any latent defects, or matter which would avoid it, he who would take advantage of them is charged with the *onus* of setting them up and proving them.

The answer in this case has not put the burthen of proving anything on the defendant in error. Every material

allegation in the complaint, for the purposes of the action, stands admitted.

As has been stated before, the bonds surrendered were all over due, and the bonds issued in lieu are payable one year after the date thereof. This affirmatively shows an "extending of the time of payment."

The sixth instruction is: "That the surrendered bonds would have no validity, as against the defendant, unless they were issued under an ordinance of the City, and unless it was shown that there was an ordinance of the City Council authorizing the issue of the surrendered bonds, the jury will find for the defendant.

This instruction ignores the fact that there are common counts, declared on in this case, based upon a promise. It ignores the fact that, behind the bonds surrendered, existed a valid debt which had not been paid. It ignores the fact that another liability than of *contract*, is imposed on the City, by law, if the notes or bonds were issued to circulate as money. Outside of all these, it proceeds on the hypothesis that upon the validity *of the bonds surrendered*, depends the right to recover *on the bonds sued on*.

It is alleged in the common counts "That plaintiff was requested by the defendant to deliver to said defendant the bonds so held and issued as aforesaid, the defendant then and there offering to pay the plaintiff the full amount *of the debt*, evidenced by said bonds, twelve months from said day, with ten per cent. interest per annum, until paid. * * * That on the faith of this understanding and agreement, and to enable said City to take up what it regarded as a ques-

tionable evidence of debt, which had been used and exchanged in the cancelling and taking up of warrants of said City drawn on the treasurer thereof, * * * and to enable it to make a proper recognition of valid, just and unpaid debts, the evidence of which had been taken up and cancelled by the use of said bonds, * * * the plaintiff, on the 9th day of October, 1874, delivered, surrendered and turned over to said defendant," etc.

To have given the instruction would have been forcing the court to say that no recovery could be had on the common counts in action, where, by the pleadings, they stand confessed.

We have never been able to comprehend, and do not now understand, how *an original good consideration* can be destroyed by the issuance of a void paper. We understand that if money be loaned on Saturday, and a note for the amount loaned be executed and delivered on Sunday, that the *note* is void, and that no action could be maintained thereon; but we do not understand that if on Monday, the note which was given on Sunday, should be given up, and another note executed, evidencing the debt of Saturday, that on a suit brought on the note given on Monday, it could be defended against on the ground it was given to take up a note executed on Sunday. The *consideration* for the last note, would be, *not the giving up of the note executed on Sunday*, but the consideration would be *the loan previously made.*

Early v. Mahon, 19 *John., N. Y.*, 147.

Clark v. City of DesMoines, 19 *Iowa*, 225.

Wright v. Hughes, 13 *Ind.*, 113.

It does not matter *now* whether there was an ordinance authorizing the issue of the "surrendered bonds" or not. We are not claiming a recovery on *them*. Our demand for a recovery is based, first, upon the *bonds in suit;* and second, *upon a promise,* which is not denied or put in issue.

The concluding portion of the instruction is: "Unless it is shown that there was an ordinance of the City Council authorizing the issue of said surrendered bonds, the jury will find for the defendant."

No such proposition as this should have been submitted to a *jury.* It involves a determination of the question as to whether an ordinance was passed in the manner pointed out by the charter. Whether an ordinance passed, is a proposition which is to be determined, *not by a jury,* but by the *court.*

Osceola, etc., v. Rost, 15 *Ind.,* 295.

Justice Bradley, of this court, on this same proposition, said:

"We also hold the existence of a law to be a judicial question to be decided by the court, though framed in form as a question of fact.

South Ottowa v. Perkins, 4 *Otto.,* 277.

The seventh instruction is: "The jury cannot find for the plaintiff, on the grounds of the original causes of action, for which the city money, or bonds on bank-note paper, were first given, unless they find that the causes of action for which such bonds, on bank-note paper, were

given accrued, that is, fell due within three years next before the commencement of this suit."

There is no dispute about the facts in this case. The evidence shows that the bonds surrendered to the City, for which new bonds were issued, were due prior to April 9th, 1869. As to the ledger account, the only reason why they were not bonded, is *because they were not due prior to April 9th*, 1869. There is no proof, anywhere, as to what specific time the debt was due, which the surrendered bonds were given in payment, or evidence of. The evidence clearly and distinctly shows *a new acknowledgment of debt*, and a new promise to pay.

Under this state of case, it is not the province of the *jury*, but of the *court*, to decide what acts or declarations amount to a new promise, sufficient to take the case out of the operation of the statute of limitations. By this instruction the jury are not to find *whether a new promise has been made*, which might take the matter out of the statute, but are instructed, absolutely, that if the cause of action, for which the City bonds were first given, accrued within three years, to find for the defendant.

Miller v. Lancaster, 4 *Me.*, 159.

Fiske v. Needham, 11 *Mass.*, 456.

Aside from the above considerations, the seventh instruction is wrong, in this: That it assumes that if an action had been commenced against the City, that it would have had to be founded on a "contract, express or implied, *not in writing*." Under our statute "all actions founded upon contract or liability, express or implied, *not in writing*,

must be commenced within *three* years after the cause of action shall accrue."

Sec. 4120, *Gantt's Digest Laws of Ark.*, 746.

Section 4125 declares that "Actions on promissory notes *and other instruments of writing*, shall be commenced within *five* years after the cause of action shall accrue."

These notes and bonds of the City were given out to take up a *warrant* drawn on the treasurer. We insist that the *five* years statute, under the evidence in this case, and not the *three* years statute, would regulate the bringing of the action. The warrant was a proper and legal evidence of debt, and an action could have been maintained upon it by any holder, at any time, within five years. Is it true, as a matter of law, that the surrender of that warrant, for time paper of the City, which it claimed the power to issue, and which has been taken up by the giving of new evidences of debt therefor, remits the party back to an action on account? A mere statement of the proposition shows its absurdity.

It is based upon one of two theories, neither of which are stated; that is, that the City had no power to waive the statute if it had intervened, or that no such promise was made. The new promise is pleaded, and not denied, and the evidence shows its making, and we shall spend no time to refute the theory that a City Council cannot pay a just and valid debt of the City, if so desires.

The eighth instruction is: "Under the instructions given by the court, the jury are directed to allow the plain-

tiff the benefit, as equitable assignee, of the causes of action for which the bonds on bank-note paper were taken up by the City, and paid out again by it, and that such was the regular practice of the officers of the City, the bonds would not represent the cause of action for which they were first paid out, but they would only represent the cause of action for which they were last paid out; and the jury will find for the defendant, unless they find, from the evidence, that such last paying out of said bonds on bank-note paper, was prior to the 9th day of April, 1869."

In view of the fact that there is not a scintilla of evidence going to show that one, or more of the bonds surrendered to the City by the defendant in error, was ever paid out the second time, the relevancy of the instruction to the facts is not apparent. It is true that there was evidence to show that the bank bought and sold the surrendered bonds and received the same in the payment of debts; and it is also true, that the City treasurer took notes and bonds in payment of City dues, and that there is evidence tending to show that the bonds thus received were again paid out. But evidence of this character does not establish, or go to establish the fact, that the bonds surrendered by the bank were of the number thus, by the treasurer of the City, taken in and paid out.

If the plaintiff in error desired to rely, by way of defense, upon the eighth instruction, he ought to have proven a state of facts to which the instruction could have been applicable.

But, outside of this, the instruction was and is erroneous. It assumes that the right of the defendant in error to recover, depends upon the fact as to whether or not the

bonds surrendered represented a debt contracted prior to April, 9, 1869, or a debt contracted since that time. The effect of the instruction, if given, would have been to say to the jury, that if they found that any one of the bonds surrendered had been paid out, by the treasurer of the City, for a debt contracted since April 9, 1869, they would find for the plaintiff in error.

If there had been nothing in suit *but the bonds sued on*, this instruction, in a modified form, might possibly have been given; but this was not the case. While it is true that the bonds sued on are equal in amount, with interest added to the amount of the new bonds, and that the bonds surrendered were due prior to April 9, 1869; yet, it is not true of the surrendered bonds, which represent the amount *of the ledger account*, for none of these were due on the 9th of April, 1869.

The instruction ought to have been so framed as to have met both views of the case.

But is open to another objection. It completely ignores the right to recover *on the bonds sued on*; it ignores the right to recover on the *original consideration*, or the *promise* declared on, and carries the right to recover back to what it is alleged was an unlawful transaction. It ignores the making of a new promise, and is unsupported by proof of a state of facts on which to base it.

Since preparing the above objections to the instructions of the plaintiff in error, we have been handed a copy of its brief.

At page six, the second instruction asked is abandoned,

and the confession made that it is bad. This instruction is one of an entire series of eight, which the plaintiff in error asked to be declared as the law of the case. It is one of a series of eight instructions, which the plaintiff in error embodied *in one request*, as the law applicable to the case. The exception is, that the court refused "to give *each*." The word "each," as used in the instruction, means *all*. This error standing confessed, this case comes within the rule laid down in *Beaver v. Taylor*, 3 *Otto.*, 46, where this court said:

"If the entire series are presented as one request, and any one proposition be unsound, an exception to a refusal to charge the series, cannot be maintained." This, we think, disposes of the instructions asked by the plaintiff in error.

Having disposed of the instructions asked by the plaintiff in error, we will now turn our attention to those given by the court on its own motion, and excepted to by the plaintiff in error.

As will be seen by an examination of the record, (printed p. 34) the exception is "to all of that part of the charge beginning with the words: 'The court is of opinion, and so instructs you, that the bonds in suit issued by the defendant, in lieu of said bonds on bank-note paper, to the end of said charge.'" This, as has been stated, includes a portion of the third, and the whole of the fourth and fifth instructions. Hence, we are dealing with what has been termed a "gross" exception. And the rule as laid down in such case is: "That if any portion of the charge thus ex-

cepted to, be good, the exception cannot be sustained."

Beaver v. Taylor, 3 *Otto.*, 46.

Johnson v. Jones, 1 *Black.*, 220.

Rogers v. The Marshal, 1 *Wall.*, 654.

That part of the third instruction given by the court, on its own motion, and which is excepted to, is as follows: (Printed record, p. 34).

"The court is of opinion, and so instructs you, that the bonds in suit, issued by the defendant, in lieu of said bonds, on bank-note paper, (the last named bonds having been originally issued, under the circumstances above stated, for valid debts against the City, to other creditors of the City than the plaintiff, and the plaintiff not having been connected with their issue) constitute a valid ground of action against the City, and the City is liable thereon to the plaintiff, although the said City bonds, on bank-note paper, were of such an appearance, and of such a form as to be especially adapted to constitute a circulating medium, and were, in fact, used in and about the City as a local circulating medium, in lieu of money."

This instruction opens a wide field, and, in the argument of its correctness, we propose to show:

First. That we are entitled to recover on the original consideration, even if the issue of the surrendered bonds was *ultra vires*, and in violation of positive statute; and

Second. That if inhibited by positive statute, that the statute itself also imposed an individual liability which the City cannot escape.

The holder of a note to whom it is endorsed or assigned for value, although the note itself is void, transfers the right of action, and is authority to sue for the original consideration.

Oneida v. Ontario Bank, 21 *N. Y.*, 490.

The defense, in this case, is based upon two propositions; that of *ultra vires* and that of the issue of notes to be used as currency, the same being denounced by the statute.

"The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong."

Union Water Co. v. Fleming Co., 22 *Cal.*, 620.

Morris Railroad v. Railroad Co., 29 *N. J. Eq.*, 542.

"The doctrine of *ultra vires*, whether invoked for or against a corporation, is not favored in the law. It should never be applied where it will defeat the ends of justice, if such a result can be avoided."

Whitney Arms Co., v. Barlow et al., 63 *N. Y.*, 62.

It is said, in *Thomas v. City of Richmond*, 12 *Wall.*, 356, that there is a distinction to be made between municipal corporations and other corporations. That is, that persons dealing with the officers of municipal corporations are chargeable with notice of the powers which such corporations possess, and it was held, in the case alluded to, that no recovery could be had against the city of Richmond on notes issued to circulate as currency. But the distinction sought to be made, has no application to the case at bar: *First*, because no recovery is sought *on notes*

issued to circulate as currency; but for work and labor and material and property furnished the city of Little Rock, which it had the right to contract for, and which it did contract for; and *second*, If it be true that the city issued notes in contravention of law, the *statute* makes no discrimination between municipal and public corporations, but places them on precisely the same footing, and subjects both to the same liabilities and penalties. This was not true in the case of the city of Richmond, for no individual *liability* was imposed on it by law.

Under the statutes of this state in relation to the issue of small notes to be used as currency, we have nothing to do with the doctrines and principles which ordinarily apply to acts that are *malum in se, malum prohibitum,* or to those which are said to be *in pari delicto.* The *statute* imposes the liability and leaves the rule of the common law as though it were not.

In *Argenti v. City of San Francisco,* 16 *Cal.,* 283, Chief Justice Field, in speaking of the power of municipal corporations, said:

"A municipal corporation can only act in the cases and in the mode prescribed by its charter, and for street improvements, of a *local nature,* express contracts authorized by ordinance, are necessary to create a liability. The doctrine of liability, as upon *implied contracts,* has no application to cases of this character.

In speaking of the class of cases where the doctrine of liability as upon *implied contract* attached to municipal corporations, the same learned judge said:

"That doctrine applies to cases where money or other

property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation on the city to do justice with respect to the same. If the city obtain the money of another, by mistake, or without authority of law, it is her duty to refund it—not from any *contract* entered into by her on the subject, but from the general obligation to do justice, which binds all persons, whether natural or artificial. * * * In these cases she does not, in fact, make any promise on the subject, but the law, which always intends justice, implies one; and her liability then arising is said to be a liability on an implied contract, and it is *no answer* to a claim resting on a contract of this nature to say *that no ordinance has been passed on the subject.* * * * The obligation resting upon her is imposed by the general law, and is *independent* of any ordinance and the restraining clauses of the charter.

The theory on which we contend for a recovery is, that although the surrendered bonds may have been void, a proposition which is not conceded, and although the bonds sued on may be *ultra vires*, that *behind* these bonds there exists a good and valid consideration, based upon and growing out of a contract which the city had the power to make and did make, *and which was not made with reference to any bond or bonds.*

CAN THE CITY BE ALLOWED TO PLEAD HER OWN WRONG, EVEN IF THE ISSUE OF THE NOTES WERE ILLEGAL, AS A DEFENSE TO HER BONDS?

The Cincinnati and Whitewater Canal Co. became embarrassed in the construction of its work. The directors of the company, through its officers, caused a large amount of

the notes of the company, payable twelve months after date, to be engraved in the similitude of bank notes. None of the notes were of a higher denomination than five dollars, and a large proportion of them were of a lower denomination. These notes, thus calculated to circulate as money, were used by the company for no other purpose than the payment of the debts thereof. By the charter the company was not authorized to exercise the functions of a bank. The notes passed and were used in the community as money. Suit was brought against the stockholders, *on the notes*. In disposing of the case the court said:

"It appears that the notes were issued on account of the company; that the company had received the consideration of the notes, was indebted to the contractors of the work to the amount delivered, and delivered the notes to them as evidence of such indebtedness. * * * If sued upon its indebtedness, expressed in the notes, it might well be doubted whether the company could be permitted to so far *take advantage of its own wrong*, as to set up a defense that it had issued the notes for such indebtedness in the similitude of bank notes to circulate as money."

Burt v. Lawler, 7 *O. St.*, 347.

At the time these notes were issued, the following statute was in force in the State of Ohio:

"SECTION. 1. That every company or association, except a bank, incorporated by the laws of this state, that shall lend notes, bonds, bills, checks, orders, certificates of deposit, or any other evidence of debt, and shall issue by their officers, agents, or any other persons, notes, bills, checks, orders, certificates of deposit, or other evidence of debt payable to

order and indorsed in blank, or payable to bearer, designed, calculated, or intended to circulate as money; or shall issue, put in circulation, or pay out for debts, or property, with or without any such loan, any such notes, bonds, bills, checks, orders, certificates of deposit, or other evidences of debt, so issued, put in circulation, or paid out by said company or association, or on their behalf pass, or circulate by delivery, shall be taken and deemed within the meaning of 'an act prohibiting the issuing and circulating of unauthorized bank paper.'"

AN ORIGINAL GOOD CONSIDERATION IS NOT DESTROYED BY THE ISSUANCE OF VOID PAPER, AND IF THE VOID PAPER BE TAKEN UP, AND A NEW OBLIGATION GIVEN, THE ORIGINAL CONSIDERATION CONTINUES.

Early v. Mahon, 19 *Johns., N. Y.*, 147.

The town of Cedar Falls constructed by contract a toll bridge across a stream in said city. The cost of the bridge was from $12,000 to $15,000. To meet this expense and pay for the bridge, the town of Cedar Falls issued notes in the denomination of $1. 2, 3 and 5. These notes were in the similitude of bank notes. At the time of this transaction, the following statute was in force:

"No person or association, or corporation shall issue any bills, drafts, other evidences of debt, to be loaned or put in circulation as money, or to pass, or to be used as a currency, or circulating medium; and every person, association or corporation and member thereof, who violates the provisions of this section, shall be punished by fine, not exceed- one thousand dollars."

Sec. 2734, *Iowa Code of* 1851.

The town authorities, very soon after the issue of these notes retired most of them by issuing *bonds* in lieu thereof, as evidence of the debt, in sums of $100 each, running six years. To secure the payment of the bonds, the town executed a deed of trust on the bridge, pledging it and the tolls for that purpose. After the execution of the deed of trust, the town repealed the ordinance fixing the toll, discharged the toll-keepers, and declared the bridge free.

A holder of the bonds issued in lieu of the surrendered bonds or notes, brought suit and asked a *foreclosure of the deed of trust.* The foreclosure, for reasons stated in the opinion, was denied, but in response to the question what *remedy* the bondholders had, the court said:

"The remedy is on the bonds themselves, *which we hold to be valid and available to the holders.* * * * But it is claimed by the defense that these notes were issued *in the form of bank bills, and were intended to circulate as money.* Such is not our opinion. * * * Its power (that of the city) to do so, (issue the notes) is denied; but the *object* itself being *legitimate,* it becomes a means necessary to an end, and to do so *was not an undue exercise of power.*"

Mullarky v. Cedar Falls, 19 *Iowa,* 24.

Here is a case where a bond was given, just as in this case, to take up notes, in the simlitude of bank notes, which it is said were issued in violation of law, and the court says, "the *object* being *legitimate,*" the act was not an undue exercise of power, but a means necessary to an end. We are unable to distinguish this case, in principle, from the one at bar.

A case somewhat analagous, in fact, and entirely in harmony with, that of *Mullarky v. City of Cedar Falls*, 19 Iowa, 24, in the case of *Clark v. City of DesMoine*, 19 Iowa, 225. The judge delivering the opinion of the court, said:

"Certain warrants in suit purport, on their face, to have issued *"for city scrip surrendered."* The city pleaded that the city scrip thus surrendered, and which constituted the consideration of these warrants, was issued in violation of the constitution and the law, being intended to circulate as money.

"To this, the plaintiff responds, in substance, that the scrip itself was issued and used by it *to redeem city warrants founded on a valuable consideration."*

"It appeared at the trial, in the year 1857, the city council passed an ordinance reciting *'the present scarcety of money; the impossibility of collecting taxes; the impolicy of paying interest on loans,'* and the policy of issuing *for general circulation convenient warrants,'* that the tax payers might become enabled to pay their taxes, and providing for the issue of engraved city warrants in denominations of $1, 2, 3 and 5. In appearance they are like bank bills, being on bank-note paper, with vignettes, etc.

"This scrip the treasurer was authorized to receive for taxes, and to exchange for outstanding city warrants, drawn in the usual form. The evidence does not show that any scrip was issued by the city, *except to pay indebtedness, or in exchange for outstanding evidences of city debt.*

"The scrip was for a time popular, and as invited by the city, its creditors received it in payment, or in exchange

for other evidences of municipal liability. Time wore on; the scrip would seem to have declined in popular favor, and not to have realized the high expectations which its emission had inspired. Empirical, if not illegal, the remedy did not cure, or relieve the corporate ills recited in the ordinance to exist. So, in 1860, the city council changed its base. In 1857, it asked warrant holders to exchange them for scrip. They did so. In 1860, it authorized the issue of city orders for the redemption of city scrip. Scrip holders, conforming to the wishes of the city, then surrendered scrip and received warrants, such as those in suit, and such as those which they had given up to the city when they received the scrip.

"On this part of the case, the court charged the scrip was illegal, and so far the defendant does not complain; but it further directed the jury that if the city owed a valid and admitted debt, paid it in scrip, and then took up the scrip by issuing the warrants in question, the law regards this as a settlement of the transaction, and the warrants would be supported by a sufficient consideration, and be valid and binding.

"The jury so found the fact to be, and the evidence fully sustains the finding. Under the circumstances, this defense is entitled to no favor. Unless corporations are exempted from the ordinary principles of fair dealing that apply between man and man, this defense has no just foundation. It is the duty of the courts not to allow the honest and just merits of a case to be entangled in the meshes of sophistical reasoning and rules purely technical. Not a member of the City Council, we are persuaded, would make such a defense for himself. * * * That the charge of

the district court was correct, even conceding the scrip to be illegal, we have no doubt."

Clark v. City of Des Moines, 19 *Iowa*, 225.

The facts in this case are precisely analogous to the case at bar, with this single difference: that in the case cited the city money was taken up, and the same evidence of debt given for it, that was surrendered when it was received, while in the case at bar a *bond* was given instead of a *warrant*.

The Logansport Insurance Co. issued and put in circulation, in violation of a statute, notes and bills in the similitude of bank notes. For the purpose of taking up this illegal issue, the treasurer of the corporation authorized a person to purchase the notes of the company. Notes were purchased, and the treasurer of the company gave a note for $800, on which suit was brought. The jury found specially that the notes were issued in violation of law. The question was, whether a recovery could be had on the note, and in the course of the opinion the court said:

"It was certainly legal, and morally right, for the persons who made and put the notes in circulation to redeem them. * * * The persons who had perpetrated the fraud, by putting in circulation paper which they were not bound to pay, had the right, legally and morally, to remedy the wrong, by redeeming the paper. This they might do personally, or through the agency of others. * * * It is clear to our minds *there was nothing illegal in the redemption of the paper, or the contract for that purpose.*"

Wright v. Hughes, 13 *Ind.*, 113.

If there was nothing illegal in the redemption of the paper, or the contract for that purpose, in the case just cited, wherein is the illegality of the redemption of the paper, or the contract for that purpose, in the case at bar?

The Erie Canal Company was authorized, by its charter, to obtain money to complete its work in two modes: *First*, by mortgage on its corporate property, and *second*, by a pledge of the corporate stock. Neither of the modes prescribed by the charter were adopted, but engraved bonds, payable to bearer, were prepared. The bonds thus prepared, which were of the denomination of fifty dollars, and in some respects not unlike bank bills, were paid to contractors, and persons for material and labor, and after thus used, were by the contractors put in circulation. The notes or bonds were signed by one Reed, the president of the Erie Canal Company, and suit was brought against him, under a statute of Pennsylvania which made persons signing notes, bills, etc., inidividually liable therefor, if issued to circulate as money. In discussing the validity of the notes thus issued, and the power of the Erie Canal Company to make and issue the same, the Supreme Court of Pennsylvania said:

"The charter of the Erie Canal Company contains the usual grant of corporate powers. The company is expressly authorized to purchase, sell, mortgage and otherwise dispose of the real and personal estate, and to do all things necessary for the proper business of the company. What is the proper business of the company? The completion of the canal, and its preservation for the uses designated by law. * * * If unable to raise money for immediate payment, honesty requires that it should give satisfactory

engagements to pay, at a future period, with legal interest for the delay. The corporation was unable to borrow money to complete the work. It gave these obligations to its contractors, in payment of debts contracted in its proper business. They are binding on it, unless they fall within the meaning of some statute prohibition. The obligations have neither the form nor the substance of bank notes. [They were not payable on demand.] There is no evidence that they were issued *in the business of discounting notes* or for the purpose *of a circulating medium*. They are simple obligations given for the payment of lawful debts, and made payable to bearer."

McMasters v. Reed's Exrs., 1 *Grant Cases* (*Pa.*), 48.

These cases are in full accord with the rule laid down in that portion of the third instruction excepted to by the plaintiff in error. Thus far we have contented ourselves with showing that an original good consideration is not destroyed by the issue of illegal paper, and that if the illegal paper be taken up, and another acknowledgment of the debt be made, that a recovery may be had upon the new acknowledgment of debt.

There are, however, another class of cases which have some bearing on the question at bar, to which we desire to call the attention of the court.

Dively brought suit on seventy-nine obligations signed by the mayor and recorder of the city. The obligations were executed in lithograph, with vignettes, and, in appearance, not unlike common bank bills. They were made payable to persons other than those to whom they were issued, and delivered and made payable, two years from

their date, to the payee or bearer, and were of the denomination of $1, $2 and $5.

The notes were issued under the the authority of a resolution of the city council to pay for a bridge, and were actually so used.

Six defences were set up by the city :

1st. That the city did not execute the obligations.

2d. Denied the official character of the persons signing the notes, and their authority to execute and issue them.

3d. That the City had no power to create the indebtedness, or to make the obligations sued on.

4th. Denied any and all indebtedness, at the time the notes were issued *to the payees.*

5th. That there was no consideration for the obligations sued on.

6. That the obligations sued on were issued without power, or authority from the City; that they were not issued to pay debts; or to pay the ordinary expenses of the City; or to pay any debt contracted therefor; but were issued for the purpose of engaging in speculative operations—building a toll bridge, and purchasing merchandize.

At the trial in the court below, the verdict was for the holder of the scrip.

The case went to the supreme court upon two questions—the competency of a juror, and for refusing to allow a wit-

ness to answer whether or not the notes were issued to circulate as money.

In the supreme court the cause was reversed *on the last mentioned ground*, and remanded. At the second trial, judgment was for the scrip holder, and the cause again went to the supreme court.

Dively v. City of Cedar Falls, 21 *Iowa*, 565.

Judge Wright, in disposing of the case, says:

"The present case was before us in 1866, and reversed, in part, because of the refusal of the court to allow the defendant inquire *whether said scrip was issued to be used and circulated as money*. Its validity and non-liability of the city, *if thus issued*, are propositions admitted under our law, and hence, this inquiry was fully made on the second trial.

"The jury found specially that the scrip was not issued to circulate as money. And, in view of the purpose and meaning of the law, and the facts of the case, this conclusion was right.

"We have said the *law* is not controverted, and hence it is conceded that this scrip would be void, if issued to circulate as money. The court (below) plainly and in unequivocal terms, so instructed the jury at the defendant's instance. The jury found the fact for the plaintiff, however, and, as we have said, we think correctly.

"The resolution authorizing its issue contained no mention that it is to be thus used. It was issued to pay for this bridge, and was actually so used. The purpose, hence, was legitimate.

The act alluded to is as follows:

An Act Concerning Small Notes for the Payment of Money.

[See Session Acts of Pennsylvania, of 1827–28, page 323.]

Section 1. That from and after the first day of January next, it shall not be lawful for any person, or persons, or body corporate, with the intention to create, or put in circulation, or continue in circulation, a paper circulating medium, to issue, circulate, or directly or indirectly cause to be issued, or circulated, any note, bill, check, ticket, or paper purporting or evidencing, or intended to purport or evidence, that any sum less than five dollars will be paid to the order of any person, or to any person receiving or holding such note, bill, check, ticket, or paper, or to the bearer of the same, or that it will be received in payment of any debt or demand, or that the bearer of the same, or any person receiving or holding the same, will be entitled to receive any goods or effects of the value of any sum less than five dollars, and that, from and after the said first day of January next it shall not be lawful for any person, or persons, or body corporate to make, issue, or pay away, pass, exchange, or transfer, or cause to be made, issued, paid away, passed, exchanged or transferred any bank note, bill, ticket, or paper, purporting to be a bank note, or of the nature, character or appearance of a bank note, or calculated for circulation as a bank note, of any less denomination than five dollars.

Sec. 2. That any and every person and persons and body corporate offending against any of the provisions of the first section of this act shall forfeit and pay for every such offense the sum of five dollars, to be recovered by any person suing

for the same, as debts of like amount are by law recovered, one-half for his own use and the other half to be for the use of the overseers, guardians or directors of the poor of the city, district or township within which such offense shall have been committed.

Sec. 3. That no such note, bill, check, ticket or paper mentioned in the first section of this act shall be held or taken to be void, or of null effect, by reason thereof; but all suits and actions may be brought and sustained on such note, bill, check, ticket, or paper, anything herein contained to the contrary notwithstanding; and in such suits or actions, if the same shall be determined in favor of the plaintiff, judgment shall be rendered for the principal sum due, on such note, bill, check, ticket, or paper, together with interest thereon at the rate hereinafter provided for, and full costs.

Sec. 4. That the drawer, and acceptor, of any such note, bill, check, ticket, or paper, and every person or body corporate, who shall indorse, or in any way put his name upon the same, shall be liable to pay to any holder thereof, together with the principal sum expressed therein, interest thereon to be calculated at and after the rate of twenty per cent. per annum from the time when such note, bill, check, ticket, or paper, was first issued, and that, without demand on the drawer, or acceptor, or any indorser or party to the same.

Sec. 5. That any person or persons, or body corporate, who shall have paid away, passed, exchanged, or transferred any such note, bill, check, ticket, or paper, shall be liable to any holder thereof, and shall pay to him or her, together with the principal sum expressed therein, interest thereon, to be calculated at and after the rate of twenty per cent.

per annum, from the time when such note, bill, check, ticket, or paper was first issued, and that without demand on the drawer, or acceptor, or any indorser, or party to the same.

Approved April 12, 1828.

As will be seen, there is little or no difference between the Pennsylvania act and the acts of Arkansas.

Two actions were brought under the Pennsylvania act, one against the mayor, aldermen and citizens of Allegheny, and the other against Campbell, for having, in his capacity as mayor, signed the notes. The question reserved at the trial was, Can the Select and Common Council of the city of Allegheny subject their constituents to the penalty of the act of April 12, 1828, concerning small notes, by creating a circulating medium of small notes contrary to law? This question was answered in the affirmative, in the court below, and this among other questions was assigned as error. At the final hearing the court said:

"The charter or the act of assembly incorporating the City of Allegheny, was not produced or read on the argument, but I take it for granted that it contains no express authority to the corporation to issue such notes as those embraced in this action. But it does not follow that the corporation are not therefore answerable for them in their corporate capacity. They have received value for them in the various works of improvements erected and made in the city, through their instrumentality, and it hardly comports well with fair dealing, that they should seek to exhonorate themselves from a debt on this account, contracted by and through their accredited agents, and with their silent acquiescence.

"It is not universally true that a corppration cannot bind the corporators beyond what is expressly authorized in the charter. There is power to contract, undoubtedly, and if a series of contracts have been made openly and palpably within the knowledge of the corporators, the public have a right to presume that they are within the scope of the authority granted.

"The object of all law is to promote justice and honest dealing, when that can be done, without violating principle. I cannot perceive that any principle is violated by holding a corporation liable for the contracts of its accredited agents, even not expressly authorized, when these contracts, for a series of times, were entered into publicly, and in such a manner, as by necessary and irresistable implication, to be within the knowledge of the corporators. It was the acquiescence of the corporators, and the habit and custom of business of the corporation, which induced the public to give credit to the scrip or notes, which was evidence of contract.

"But, when to this circumstance we add that the corporators themselves received the value of these notes, or contracts, in the erection of improvements in the city, and enjoyed, and still enjoy, the value of them, the conclusion is irresistable that the corporators ought to pay them by the assessment of taxes on the corporators, if it has no other available means. The debt is due by positive engagement—it is due *ex equo et bono*—in the forum of conscience and the forum of law. One rule of law is often met and counterchecked by another of equal force, so that although the corporators are, in general, protected from unauthorized acts of their agents, yet, at the same time, a rule of equal force requires that shey should not deceive the public, or

lead them to trust and confide in unauthorized acts of their agents. If they receive the avails and value of those acts, it is implicit evidence that they consented to and authorized them, they adopt the act, and are responsible to those who, on faith of such acquiesence and approbation, trusted their agents, I speak now upon the basis of such contracts *not being prohibited by statute.*

" It is contended, however, that the issuing of such contracts were, positively, *prohibited* by the statute of the 12th of April, 1828. That act, in the first section, prohibits corporations from issuing such contracts, or notes, as those embraced in this action, and the second section imposes a penalty of five dollars for so doing, so that according to the usual construction of such statutes, the notes would be void and irrecoverable, as the statute imposed a penalty on their issue, if there was not in the statute itself the seed and elements of a contrary conclusion. The third section, however, provides that no such notes or bills, as described in the first section, shall be held or taken to be void, or null, by reason of the said statute, but that suit may be brought and sustained, notwithstanding anything contained in the act, and a recovery be had for the principal sum due, with interest, as provided in the fourth section, at the rate of twenty per cent. per annum, from the date when such notes were issued.

" If the first and second sections are the *bane* of the noteholders, the other sections are its *antidote*, and these remedial provisions are in accordance with the principle stated in the commencement of the opinion, to-wit: That although the issuing of the notes may not be authorized, yet the corporation is bound, having received value, and deluded the public into a belief that they were good and valid.

"The great object of these remedial provisions was to protect the public, whilst the first and second sections of this act was to deter corporations from such contracts. The second contained a penalty, *eo nomine;* but if, in defiance of that, the corporation issued the scrip, still they were held liable for the amount, with a large additional interest, and this was the true policy. For, if the notes had been made utterly void and irrecoverable, the statute would have played into the hands of the corporators, and enabled them to accomplish the very object which it was the design of the Legislature to prevent: that is, to defraud the public. The provisions of the statute are very plain and intelligible. They announce two propositions: 1st, you violate the law and incur a penalty, if you issue small notes, under five dollars, and put them in circulation currently; but if you will violate the law and issue them, and incur the penalty, you shall pay the holder the uttermost cent you engage to pay on their face, and, in addition, if he is compelled to bring suit, you shall pay interest at the rate of twenty per cent. per annum. We endeavor, proclaims the sovereign authority of the state, to prevent you and save you, but if we cannot, still we will not assist you in defrauding the public. You shall pay the innocent holder of your contracts every cent you promise, and if you put him to the trouble and delay of a law suit, you shall pay twenty per cent interest. Any other course, on the part of the legislature, would have been like a man flaggellating himself because he had received an injury from another.

"The legislature did not choose to punish the public, who had innocently received such notes, but endeavored to punish those who had unlawfully issued them, by compelling them to redeem their engagements with suitable interest; a very sensible and judicious policy, which we will en-

deavor fairly to carry out. The statute of the 12th of April, 1828, does not, therefore, make these bills or notes null and void in the hands of the holder; but, on the contrary, does expressly make them valid, and recoverable in the hands of the holder, and good against the corporation. * * *

"The plaintiff in error might have avoided this accumulated or increased interest if they had provided for the payment by suitable means, or actually paid the notes, as it was their duty to do by the terms of the engagement. But instead of doing that, they recklessly folded their arms, whilst many a poor and worthy man and woman suffered by their acts.

"But, having put on a bold and swashing defiance of the policy and laws of the state, and played their card reckless as to who suffered, it remains for the man who has expended his toil and his sweat, and his means for these notes, to play his, and claim the benefit of the law.

We cannot permit our mind to be swerved by any mystification of legal principles, or any refined subtlety of distinction. The corporation is bound by law to pay these notes, and they are bound by law, when suit is brought and judgment rendered against them, to pay twenty per cent interest.

Allegheny City, v. McClurken & Co., 14, *Pa.*, 81.

Before proceeding to a discussion of the acts passed by the General Assembly of the State of Arkansas, in relation to small notes and change tickets, it becomes necessary to call the attention of the court to a provision of the Constitution of the State of Arkansas of 1836, in relation to banks.

"The General Assembly may incorporate one State Bank, with such amount of capital as may be deemed necessary, and such number of branches as may be required for the public convenience, which shall become the repository of the funds belonging to, or under the control of the state; and shall be required to loan them out, throughout the state, and in each county, in proportion to representation. And they shall further have power to incorporate one other banking institution calculated to aid and promote the great agricultural interests of the country; and the faith and credit of the state may be pledged to raise the funds necessary to carry into operation the two banks herein specified: *Provided*, such security can be given by the individual stockholders as will guarantee the state against loss or injury."

Constitution of Arkansas of 1836.

The public policy of the state, as will be seen from this provision of the Constitution of 1836, was not against banks or banking, for by that constitution it was made the duty of the General Assembly to incorporate a State Bank with such amount of capital as it might deem necessary, with such a number of branches as the public convenience might require, and to loan the funds and revenues of the state and bank, to individuals throughout the state in proportion to the representation of the different counties. One of the chief objects of organizing civil government at that day, in Arkansas, as its constitution clearly discloses, was to enable its citizens to borrow money from the state. Not content with this, the constitution further provided that, in addition to what money should be created by the State Bank, that one other bank should be incorporated, the chief object of which was to "aid and promote the great ag-

ricultural interests of the country." That is to furnish impecunious persons with means to purchase plantations, negroes, mules, etc.

At the first session of the legislature after the adoption of the constitution of 1836, an act was passed creating the State Bank, with its several branches, and a committee to make a distribution of the money, "in proportion to representation;" and that Bank, which was to be the especial help-mate of the "great agricultural interests of the country," was also chartered. As contemplated by the constitution of 1836, the money of both banks was loaned, and is yet loaned. These banks and their branches issued bank notes of different denominations, and were so authorized to issue at the time of the passage of the acts hereinafter referred to. Attention is called to this fact, because it is one which should be known, and kept in mind, when we come to construe the different acts inhibiting the circulation of small bills and notes. The first act passed upon this subject, was after the incorporation and organization of the "State Bank," and the "Real Estate Bank," and is as follows:

"*An act to prevent the circulation of private notes in this State.*"

Section 1. No person or persons, *unauthorized by law*, shall intentionally create, or put in circulation, as a circulating medium, any note, bill, bond, check, or ticket, purporting that any money or bank notes will be paid to the receiver, holder, or bearer, or that it will be received in payment of debts, or to be used as a currency, or medium of trade, in lieu of money.

Section 2. If any person shall issue, put into circula-

tion, sign, countersign, or endorse any such note, bill, bond, check or ticket, he, she or they, so offending, shall be indicted, and being thereof convicted, shall be fined not less than fifty nor more than three hundred dollars, and be imprisoned not exceeding twelve months.

Section 3. If any person or company vend, pass, receive, or offer, in payment, any such note, bill, bond, check or ticket, he, she or they, so offending, shall forfeit the sum of fifty dollars, to be recovered by an action of debt, with costs, to the use of any person, who will sue for the same, before any justice of the peace of the county in which the party offending may be found.

Section 4. The preceding sections shall not affect any note issued by any bank, *authorized by law*, in the United States, except notes *for a less sum than five dollars.*

Approved Nov. 25, 1837.

It will be observed that the provisions of this act declares penalties against persons who are *not by law authorized* to issue notes for circulation, and as to the notes issued *by authority of the law*, of any other state, of a less denomination than five dollars, that their circulation is prohibited.

Before proceeding to a construction of this act, it becomes necessary to set out another.

"*An act to compel the payment of change tickets.*"

Section 1. The holder or owner of any change ticket, bill, or small note, issued for the purpose of change, or otherwise, shall have the right to sue the drawer, issuer, or endorser of such change ticket, or tickets, bill or bills, small note or notes, before any justice of the peace in this state.

Section 2. The justice of the peace before whom any suit may be brought, under the provisions of this act, shall, in all cases, where he is satisfied that the defendant in such suit did draw, issue, sign, or endorse, the change ticket, bill, or small note, sued on, and that the same is not paid, forthwith give judgment for the plaintiff, for the amount of such change ticket, bill, or note sued on, and shall forthwith grant the plaintiff an execution on the judgment, if the plaintiff require execution.

Section 3. It shall not be any bar to any plaintiff obtaining judgment on any change ticket, bill or small note, sued on, that payment will be made when the sum of five dollars is presented, but the justice shall give judgment for the amount of the change ticket, bill or small note sued on.

Section 4. The justice before whom any judgment may be obtained by the provisions of this act, shall not grant, or allow, any appeal or stay of execution, nor shall the defendant be permitted or allowed to have any stay of execution, appeal or certiorari, writ of error, or injunction, but shall abide the judgment of the justice.

Section 5. The act passed at this session of the General Assembly, entitled "An act to prevent the circulation of private notes in this state," approved November 25, 1837, shall take effect and be in force from and after the first day of March next.

Approved February 14, 1838.

At this point a matter of public history needs to be called to the attention of the court. After the State of Arkansas was admitted into the Union, the legislature, by an act thereof, authorized the governor to appoint two persons "to revise and arrange the statute laws of this state, *and pre-*

pare such a code of civil and criminal laws, as in their opinion, may be necessary for the government of this state, in accordance with the constitution."

Under this authority, a code of civil and criminal laws was prepared and presented to the legislature at the October session of 1837. The work thus presented by the revisers to the legislature, was referred to appropriate committees and passed separately, with such amendments as to the legislature seemed proper.

See Revised Statutes of Arkansas for 1838.

After this had been done, the legislature passed an act providing for the publication of the acts thus passed. The 24th section of said act is as follows:

"For the purpose of construction, the Revised Statutes passed at the present session of the General Assembly, shall be deemed to have been passed on the same day, notwithstanding they may have been passed at different times; but if any provisions of different statutes are repugnant to each other, that which shall have been last passed shall prevail, and so much of any prior provisions as may be inconsistent with such last provisions shall be deemed repealed thereby."

Revised Statutes of Arkansas, 1838, *p.* 697.

The act of November 25, 1837, and that of February 14, 1838, were passed at the session of the Legislature alluded to, as a part of the revision, and are, therefore, to be construed as though passed on the same day, unless there be a repugnancy between the two acts.

It is argued by the plaintiff in error that the small notes,

or bonds, surrendered by the bank, to the city, and for which the bonds sued on, and the ledger account was given, are void by reason of some statute, and by reason of being void, that no recovery can be had thereon. Hence, an examination of the entire legislation of the State, on this subject, necessarily has to be reviewed.

It is not contended there is a repugnancy between these acts. The position assumed, by the plaintiff in error is, that neither the act of November 25, 1837, entitled "An act to prevent the circulation of private notes in this State," nor that of February 14, 1838, entitled "An act to compel the payment of change tickets," have any application to notes and bills issued by cities or towns. We contend they have.

We have already stated that at the time of the passage of these acts, there were two banks in the State, with branches, which were *authorized by law*, to issue notes for circulation.

The first section of the act of November 25, 1837, declares:

"No person, or persons, *unauthorized by law*, shall intentionally create, or put in circulation, as a circulating medium, any note, bond, bill, check, or ticket, purporting that money, or bank notes, will be paid to the receiver, holder, or bearer," etc.

It was not the object of this section to inhibit the circulation of *all* small bills and notes; the penalties of the act are only directed against the person or persons, who, "*unauthorized by law*," do the acts complained of.

If the Legislature of Arkansas had stopped at the passage

of the act of November 25, 1837, very much such a state of case as was presented in the case of *Mullarky v. Cedar Falls*, 19 *Iowa*, 24, *Clark v. Des Moines*, 19 *Iowa*, 225, and that of *Direly v. Cedar Falls*, 21 *Iowa*, 566, *and* 27 *Iowa*, 227; for, as has been seen, it was conceded in the cases referred to that if the bonds and scrip were issued to circulate as money, no recovery could be had thereon, but the notes in the cases alluded to, having been given to evidence an honest debt, and not to circulate as money, they were held not to be void.

But the Legislature of Arkansas did not stop at this point. It saw that a great fraud might be perpetrated on the public, by the issuer, drawer, and indorser of bills of the character described in the act, if no personal liability was fixed on the persons drawing, issuing and indorsing the same. Therefore the sovereign authority declared, we will inhibit the issue of these small bills, and provide adequate penalties for a violation of the law; but if you do not respect the law, and will violate it, we will so arrange it that the violators of the law shall not be in position to plead their own wrong or receive protection from the law which they have violated. Therefore the Legislature said we will punish you if you issue and put in circulation notes or small bills to be used as money, and in addition thereto you shall pay the full amount of all notes and bills you put forth. It was with this object and for this purpose, the act of February 14, 1838, entitled "An act to compel the payment of change tickets" was passed.

The plaintiff in error, however, denies that it comes within the provisions of this act. Let us see if this be true. It is contended that the word "person" in the act of November 25, 1837, does not include *corporations*, and that if

it does, the corporations referred to are *private*, and not *municipal*.

We have, in this State, a statutory rule of construction of the meaning of the word "person," and it is as follows:

"When any subject matter, party, or person, is described, or referred to, by words importing the singular number, or the masculine gender, several matters and persons, and females as well as males, and *bodies corporate*, as well as individuals, shall be deemed to be included."

Revised Statutes of Arkansas, 1838, *p.* 697.

This statute was in force at the time of the passage of the acts of November 25, 1837, and of February 14th, 1838, and by enactment became a part thereof. But in addition to the rule of construction, declared by the act, the Supreme Court of Arkansas have twice construed the act of November 25, 1837, and of February 14, 1838.

Van Horne was, in 1842, indicted for counterfeiting small notes, under the denomination of five dollars, issued by the city of Little Rock, and convicted. Two propositions of law were argued before the Supreme Court of this State:

First. That as the charter of the City of Little Rock gives no authority to emit a paper currency, and that the issue of small notes being expressly forbidden by statute, that the issue, if made by the city, would be absolutely void, and therefore it was not an offense to counterfeit them.

Second. That the word "person," did not include corporations. In response to the meaning of the word "per-

son," as used in the act of November 25, 1837, and February 14, 1838, the Court said:

"It is said, as the term *corporation* does not occur in either of the acts prohibiting the issue of these small bills, that their emission are not necessarily excluded from circulation. The term "person," is used in a general signification, and includes artificial persons, as well as natural ones, and, as a general rule, this the authorities conclusively establish. The evil to be prevented was, the issue and circulation of small notes as a paper currency, and this the Legislature intended to extirpate. If natural persons are only to be held responsible and punished for these offenses, then, indeed, was the real mischief apprehended, and designed to be guarded against, scarcely touched, and not at all remedied. For it is evident that the dangers and temptations were far greater from the worthless issues of corporations than from individuals."

Van Horne v. The State, 5 *Ark.*, 352.

In the same case, in response to the proposition that the paper would be void against the city, and hence no offense to counterfeit, the Court said:

"It is argued that, as the charter of the City of Little Rock gives no authority to emit a paper currency, and as the issue of these change tickets, or small notes, are expressly forbidden by a positive statute, it necessarily follows that such emission is to be considered absolutely void, and therefore it is no offense to counterfeit them.

"The Legislature passed *three* acts in relation to the subject, and they all are *in pari materia*, and are to be construed together. The act of February, 1838, made the

drawer, issuer or endorser of these change tickets, responsible to the holder, or owner of them, by an ordinary suit before a justice of the peace, and directed judgment to be given for the full amount expressed on their face. The act of November, 1837, forbids all persons from issuing, or putting in circulation these change tickets, as a currency, under the penalty of being indicted. * * *

"It is certainly unlawful for any corporation to issue change tickets, and it is equally true that, if they do, *the corporation is liable for the amount of such issue*, and forfeits the sum of fifty dollars for passing or receiving them. And, besides these remedies, the persons of the corporations, who issue or put them in circulation, are answerable upon indictment in the penalty of fine and imprisonment. The issues, then, *are not void*, as it is contended, *or even voidable;* for all these several remedies are given for the purpose of suppressing such a currency."

Van Horne v. The State, 5 *Ark.*, 352.

Counsel for the plaintiff in error, says the Supreme Court of Arkansas, or rather, that the judge delivering the opinion, entirely overlooked the act of December 17, 1838, the act at the time being "smothered in the pamphlet acts, and the Court looking no farther than the Revised Statutes." The judge delivering the opinion of the court, contradicts the counsel of the plaintiff in error. The judge delivering the opinion of the court, says: "The Legislature passed *three* acts in relation to this subject, and they are all *in pari materia*, and to be construed together." From this point the learned judge proceeds to state the force and effect of the act of February 14th, 1838, and that of November 25, 1837. It is true no direct mention is made of the act

of December 17, 1838, beyond the fact that it is one of *three* acts *in pari materia*, and to be construed together. Why it was not necessary to speak of the force and effect of that act, is a matter which we will take up further along and show, conclusively, that it had no bearing on the question then under consideration.

It is further said by counsel, for the plaintiff in error, that the court held in the case of *Van Horne v. The State*, 5 *Ark.*, 352, "that the indictment was valid under the Arkansas Statutes, because it was wholly immaterial whether the forgery be of a bill genuine or binding on the corporation, or not." In this, the counsel are again in error. The court, in the case alluded to, placed the question on the two grounds mentioned in the opinion, and at the conclusion of the subject, say, that if it were otherwise the points would not avail Van Horne, because of the Statute covering the same.

The counsel, for the plaintiff in error, speak in a facetious and irreverent manner of the construction placed on the acts of November 25, 1837, February 14, 1838, and December 17, 1838, in *Van Horne v. The State*, as though this was the only construction of these acts prior to 1878.

In the case of *Anthony ex parte* all these acts, so far as they relate to the question now under discussion, were again passed upon by the Supreme Court of Arkansas, and, as will be seen, the act of December 17, 1838, was not "smothered in the annual pamphlet publication" of the Acts of the Legislature, and unknown to the court. In speaking of these three acts the court said:

"The principal design of the statutes of February 14th and December 17th, 1838, mentioned above, and also of

another statute, approved November 25, 1837, was to free the community, entirely, from the circulation, as currency, or change, of every species of small paper, *whether issued by companies, corporations, or individuals*, and thereby relieve them from all the evils incident to such a circulation.

"And, to this end, the issuing and circulation of such paper was, by the provisions in said statutes contained, inhibited to all persons, companies and corporations, and such prohibition enforced, not only by the denunciation of criminal punishment against such as should issue, put into circulation, sign, countersign, or endorse, such paper, and of heavy penal responsibilities against such as should vend, pass, receive, or offer it in payment; but also by making the *drawer*, and every individual who should sign, endorse, or affix his name thereto, *responsible to the holder*, or owner thereof, for the amount therein mentioned, in gold or silver, notwithstanding any conditions therein specified that payment will be made when the sum of five dollars is presented, or in bank notes, or that it will be received in the payment of debts.

"But, according to our understanding of these statutory provisions, they embrace only such instruments as purport to be for five dollars, or a sum under five dollars, and were, by the maker, drawer, issuer, endorser, or other person affixing his name thereto, designed to circulate, from hand to hand, as currency, or change, and such was the interpretation of them by this court in the case of *Van Horne v. The State*, decided at the last term.

Anthony ex parte, 5 *Ark.*, 360.

This case is a clear affirmation of all the doctrine laid down in the previous one, and we submit that both are

well considered constructions of the acts now under discussion.

We insist, that with the construction of the acts thus far shown, that had suit been instituted in the United States Circuit Court of Arkansas, upon notes and small bills, such as are described in the acts herein alluded to, sufficient in amount to give jurisdiction, that the circuit court would have necessarily been compelled to render judgment on the notes. And we contend further, that if the question had been brought to this court on a writ of error, that this court would have been compelled to accept and follow the construction of these statutes as expounded by the Supreme Court of Arkansas, in *Van Horne v. The State, and in Anthony ex parte*, 352 *and* 360, 5 *Ark.*

The question then arises: The liability once fixed, as to this class of paper, by the highest judicial tribunal of in the state, can this liability be destroyed by a change of opinion, and a reversal of these decisions, after they have been recognized as the correct exposition of these statutes *for a period of thirty-five years?*

But there is another case decided by the Supreme Court of Arkansas, wherein the court speaks of the liability of parties, and the object of these statutes.

Williams loaned Greer a certain amount of notes and small bills, for which the note of Greer was taken, with Yeates and Butts as securities. Suit was brought on the note against Yeates and Butts, and they pleaded in bar to the action that the consideration of the note sued on was certain change tickets, issued in violation of the statute, and intended to be used and circulated as money. To this plea there was a demurrer. The Supreme Court of Ar-

We start, in the construction of the act of December 17, 1838, with these propositions settled: first, that the word "person," as used in the first section of the act of November 25, 1837, includes *municipal corporations*, and second, that if a city or town issues the bills and small notes, the corporation is liable for the amount of such isssues, and third, that the issues are not void, or voidable.

Van Horne v. The State, 5 *Ark.*, 352.

Anthony exparte, 5 *Ark.*, 360.

Judge Dillon says the act of December 17, 1838, did two things, "that it removed any doubt as to whether municipal corporations were embraced within the inhibitions of the original act—that of November 25, 1837—and second, it gave an additional remedy against the officers of the municipal corporation, and making them responsible personally to the holder."

Continuing, he says: "Since the Legislature chose to pass this special act relating to municipal corporations, it may be said the supreme court erred in deciding that corporations were included in the original act. But, as between the Legislature and the supreme court, the latter is the proper and best interpreter of the meaning of previous acts, and besides, this last act had been passed and in force three or four years before the case of *Van Horne v. The State* was decided.

See Printed Record, p. 33.

This construction is in accordance and harmony with our theory. The act of February 14, 1838, only extended the right of action for a recovery of the amount of the bills, to the "drawer, issuer or indorser." The Legislature at once

saw that so long as the remedy was confined to these three, that the mischief was not likely to be suppressed, where the notes were issued by corporations, or indorsed by them; therefore, for the purpose of extending the remedy, for the more effectual suppression of the mischief, it was deemed advisable to extend the liability to the officers of the corporation who signed the bills and small notes. This, we say, is the reasonable and fair construction of the act. This construction allows all three of the acts to stand and have some force and meaning, and any other construction leads to absurd results.

If the act of December 17, 1838, was intended, by the Legislature, to apply to "cities, towns and corporations," and that of November 25, 1837, to "persons," it shows a strange public policy. By the one act, if a "person" issues small bills and notes and puts them in circulation, he is subject to a fine of not less than fifty, nor more than three hundred dollars, and imprisoned not exceeding twelve months, and, in addition thereto, is made liable for the amount of the notes. By the other, if the construction contended for by the plaintiff in error be correct, an individual may issue notes and small bills *in the name of a corporation*, put them in circulation as money, without becoming subject to fine, imprisonment or a criminal prosecution. This would not be a suppression of the mischief.

There is no provision in the act of December 17, 1838, for fine or imprisonment against parties putting small bills in circulation, in the name of the corporation, as money. The only liability mentioned is individual, and confined to the person or persons who sign the same. Judge Lacy said, in commenting on these acts, and the intent of the legislature, that—

"The evil to prevented was the issue and circulation of small notes as a paper currency. If natural persons are only to be held responsible and punished for these offenses, then, indeed, was the real mischief apprehended and designed to be guarded against, scarcely touched and not remedied. For it is evident that the dangers and temptations were far greater *from worthless issues of corporations than from individuals.*"

Van Horne v. The State, 5 *Ark.*, 352.

If the acts of November 25, 1837, and February 14, 1838, relate only to notes and small bills issued by "persons," the penalties provided for a violation of these acts, cannot be extended to the officers who sign notes, *issued in the name of corporations;* for, if "corporations" were not within the legal contemplation of the legislature at the time these acts were passed, *its officers certainly were not.*

We take it for granted that we have, up to this point, shown such a uniform construction of these statutes, that a liability was fixed upon municipal, as well as public and private corporations, and we contend this liability must continue, unless, by subsequent legislation, it has been changed.

No legislation or judicial construction occurred which, in any manner, related to this subject, until the 8th of January, 1855, when the following act was passed:

"*An act to restrain the circulation of change tickets.*"

Section 1. That it shall not be lawful for any person or persons to put in circulation, sign, countersign, or endorse any bill, bond, note, check or ticket, of a less de-

nomination than five dollars, *with an intention that the same shall pass as currency*, and that no person or persons, or company, shall, within this state, receive, vend, pass, or offer in payment, any bank-note, bill, bond, check, or ticket of a denomination less than five dollars, *and intended to be used in circulation as currency*, whether the same were first issued in this state or not.

Section 2. That a violation of any of the provisions of this act shall be punished as a misdemeanor, punishable in any of the circuit courts of this state, by presentment or indictment, and the party offending, on conviction, shall be fined any sum not less than five nor more than five hundred dollars, at the discretion of the jury.

It will be observed that there is no declaration in this act, that it is intended as a repeal of any prior act or acts, and the absence of a repealing clause, leads us to the conclusion *that a new class of persons were aimed at*, rather than a change in the then existing laws.

It will be observed, that by the terms of this act, a *fine* was imposed upon persons who "put in circulation, receive, pass, sign, countersign or endorse, any bill, bond, note, check, etc., and also upon any person or company who shall "receive, vend, pass, or offer any such note, bill, bond, check, etc., in payment."

The prior acts on this subject did not subject persons "receiving, vending, passing, or offering in payment," the inhibited notes to either *indictment, fine or punishment*. All that the third section of the act of November 25, 1837, does, is, to subject persons or companies who "vend, pass, receive, or offer in payment," the inhibited notes, *not to a criminal prosecution*, but to a *civil action*, for fifty dollars

to the use of any person who will sue for the same *before a justice of the peace.* Therefore, it appears, very plainly, that one of the objects of the act of January 8th, 1855, was to subject persons who, before that time, were only liable *in a civil action,* to indictment and punishment, who should "receive, vend, pass, or offer the same in payment."

The other portion of the act is aimed at persons who "put in circulation, sign, countersign, or endorse," the inhibited paper. There is no substantial difference between this section and the second section of the act of November 25, 1837, save that the penalty is lighter in the last act. It may be that the object of legislation was to reduce the penalty prescribed for the same acts by the second section of the act of November 25, 1837; but such is not our construction of the act. The first section of the act of November 25, 1837, as will be seen by examination, is not aimed at, or against, the issue of *all* small bills, notes, etc., but only the issue by persons, "*unauthorized by law.*" We have shown, elsewhere, that the issue of notes for circulation as currency, was conferred on the "State Bank" and the "Real Estate Bank," and branches. Hence, here was a class of notes which were *authorized by law,* the circulation of which was not inhibited, and the use of which was not to subject persons using them to any of the penalties provided by act of November 25, 1837.

Prior to 1855, both the "State Bank" and the "Real Estate Bank" had suspended, and its issues were called in, and, as a natural consequence, there were no notes in circulation, *authorized by the law of the State;* but there were notes in circulation, as currency, *authorized by laws of other States,* and it was the "putting in circulation, signing, and countersigning" of these notes, issued by au-

thority of law, *of other States*, which the penalties of the act of January 8th, 1855, were partially aimed at.

We indulge in this construction, for the reason, we cannot bring ourselves to the belief that the Legislature, by the passage of the act of January 8th, 1855, intended to arrange *new penalties* to persons *already within the law;* but, on the contrary, intended to reach a class of persons, whom we have shown were, prior to the passage of the act of January 8th, 1855, *outside of the existing acts.*

It is conceded by all, that the object of all legislation of this character is, to suppress the evil. This being true, is it reasonable to suppose that the General Assembly, at a time when its attention was directed to the suppression of an evil, and at a time when it was extending penalties to persons who, before that time, were not within the penalties prescribed in the then existing acts, intended *to lighten the penalties of another class?* Evils are not suppressed by the reduction of penalties, and no such inferences can be indulged.

But, admit for the sake of the illustration, that the effect of the act of January 8, 1855, was, by implication, to repeal the first, second and third sections of the act of November 25, 1837, does it follow that it repealed the act of February 14th, 1838, or in any manner affected the individual liability imposed upon the persons described therein, or the remedy provided for their enforcement? Certainly not.

On the 8th of February, 1859, the Legislature passed another act, which it is contended by the plaintiff in error has a bearing on this subject, but which, we contend, has not. It is as follows:

to the use of any person who will sue for the same *before a justice of the peace.* Therefore, it appears, very plainly, that one of the objects of the act of January 8th, 1855, was to subject persons who, before that time, were only liable *in a civil action,* to indictment and punishment, who should "receive, vend, pass, or offer the same in payment."

The other portion of the act is aimed at persons who "put in circulation, sign, countersign, or endorse," the inhibited paper. There is no substantial difference between this section and the second section of the act of November 25, 1837, save that the penalty is lighter in the last act. It may be that the object of legislation was to reduce the penalty prescribed for the same acts by the second section of the act of November 25, 1837; but such is not our construction of the act. The first section of the act of November 25, 1837, as will be seen by examination, is not aimed at, or against, the issue of *all* small bills, notes, etc., but only the issue by persons, "*unauthorized by law.*" We have shown, elsewhere, that the issue of notes for circulation as currency, was conferred on the "State Bank" and the "Real Estate Bank," and branches. Hence, here was a class of notes which were *authorized by law,* the circulation of which was not inhibited, and the use of which was not to subject persons using them to any of the penalties provided by act of November 25, 1837.

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On the 8th of February, 1859, the Legislature passed another act, which it is contended by the plaintiff in error has a bearing on this subject, but which, we contend, has not. It is as follows:

"*An Act to prevent the people from beiny defrauded with* BANK *paper.*"

[The first section of the act has expired by its own limitation.]

Section 2. That it shall not be lawful for any person, or persons, from and after the Fourth day of July, 1860, to put in circulation, to receive, or pass, sign, countersign or endorse, any bond, bill, check, or ticket, of a less denomination than twenty dollars, *with an intention that the same shall pass as currency;* and that no person or persons, or company, shall, within this State; receive, vend, pass, or offer in payment, any bank note bill, bond, check, or ticket, of a denomination less than twenty dollars, *and intended to be used in circulation as currency*, whether the same was first issued in this State, or not; *Provided*, That nothing herein contained shall be so construed as to prevent the circulation of *negotiable paper*, or county scrip or warrants.

Section 3. That a violation of any of the provisions of this act, shall be a misdemeanor, punishable in any of the Circuit Courts of this State, by presentment, or indictment, and the party so offending, upon conviction, shall be fined any sum less than fifty nor more than five hundred dollars for each and every offense.

Approved, February 8, 1859.

This act, judging by its title, was intended "to prevent the people from being defrauded with *Bank* paper." By its terms, it expressly exempts "negotiable paper" from the penalties declared by act, and declares that its intent is not to inhibit its circulation. If the facts show, and we

contend they do, that the bonds surrendered to the city, were issued as "negotiable paper," and not as a circulating medium, the act has no application as to this case.

But the Legislature passed another act, whereby all former penalties, imposed for the purpose of prohibiting the circulation of Bank bills of any denomination, were repealed. It is as follows:

"*An Act to repeal all State laws that prohibit the circulation of Bank bills of any denomination.*"

Section 1. That all acts, or parts of acts, prohibiting the circulation of Bank bills of any denomination, or amount, and fixing a penalty for such circulation, be, and the same are hereby repealed; but nothing herein contained shall be construed so as to authorize the issuance of shinplasters, change notes, or other *irresponsible paper*, by individuals, corporations, or others.

Approved, November 18, 1861.

Counsel for plaintiff in error say, that this act "contained an express reservatino of paper issued without legal authority." Such is not our construction. The act says the repeals therein declared, shall not be so construed "as to authorize the issuance or circulation of shinplasters, change notes, or other *irresponsible paper*." That is, that the act shall not be so construed as to release persons issuing "shinplasters, change tickets," etc., from the individual liability imposed by the previous acts.

But, be this as it may, neither the act of January 8, 1858, nor that of February 8, 1859, is in any manner in conflict with the act of February 14, 1838, which imposes individ-

ual liability on the "drawer, issuer or indorser of the inhibited paper.

But the answer of the plaintiff in error, to all this, is, that no matter to what absurdities the thing may lead, that the supreme court of Arkansas, at its last May term, in the case of *Lindsay v. Rottaken*, 32 *Ark.*, 619, reconstrued all these acts, and that this court is bound to follow it.

The case of *Lindsay v. Rottaken* was made up and presented to the circuit court of Pulaski county *after* the defendant in error had commenced suit against the city of Little Rock, and it was no doubt believed by those who brought it, that in view of the mania of judicial repudiation which had taken place in this State, that an opinion might be obtained which would relieve the city of the payment of its just and honest debts.

The opinion of counsel seems to have been well founded, and the conclusion which the court reached, is, in our opinion, based upon a perversion of facts, and a misapplication of the well known rules of construction. We shall now proceed to an examination of the case of *Lindsay v. Rottaken*, 32 *Ark.*, 619.

On the 14th of December, 1875, the Legislature of the State of Arkansas, by an act duly passed, declared that,

"All city warrants, scrip, acceptances, or *money*, shall be receivable for any city purposes, except for interest tax, and for all debts due the municipal corporation, by whom the same were issued, without regard to the time or date of issuance, of such warrant, scrip, acceptance, or *money*, or the *purpose for which they were issued.*"

Act of December 14, 1875.

It was contended that the act was unconstitutional, but the court held it was not.

What in this act is called "city money," is descriptive of the notes issued by the city of Little Rock, and other towns in the State. The Legislature knew it as "city money," and knew that it had been used at par in payment of the debts of the cities and towns by which it had been issued. It knew that it had been issued with the understanding that it would be received in payment of city dues, and that after the revolution of 1874, the new officers refused to receive it, hence the act of December 14, 1875.

Having declared the act constitutionally passed, the next work of the court was to nullify its provisions, and this is the language in which the emasculation of the act begins (p. 623):

"Why the word *money* was used in the act we do not know, but if the effect of the act is to legalize all paper issued by cities in the form of, and for the purpose of circulating as money, it would also have the effect to legalize and make valid all of the spurious county scrip that was spawned upon the counties by corrupt or reckless officials, before the passage of the act, which was certainly not the purpose of the Legislature."

How did the court know this? The purpose of the Legislature is to be determined, in most courts, from the act itself. There is no ambiguity in the act. It needs no construction. It says "city money" shall be received "for all city purposes, except for interest tax, and for all debts due the municipal corporation by whom they were issued, without regard to the date of issuance," or the purpose for which it was issued. The answer of the court to this is, that they

do not know *why* the word "money" is used. Does this want of knowledge render the act a nullity? Suppose the effect of it was to validate other scrip, what had the court to do with that? Whether scrip should be validated was a question for the Legislature, and not the court.

Continuing, the court say (p. 623): "In the absence of express words in the statute, we are not at liberty to infer that the legislature intended to cure any paper illegally issued by counties or cities."

When an act declares, as this one did, that the "City money" should be received without regard to the time or date of issuance, or the purpose for which issued, there is nothing left to "inference," and if these words evince an absence of "express words," we should be pleased to see a sentence in which there are express words. To say the least of it, the decision is at variance with every canon of construction found in the books of the profession, A well expressed and clearly defined intention of the legislature is thwarted, because the court do not know *why* the words "City money" were inserted in the act, and because the *effect* of the act would be to validate certain county and city scrips—a thing the legislature had a perfect right to do.

Having nullified the law, then commences a series of misstatements of fact, and application of principles which has no paralell in the history of jurisprudence.

For the purpose of showing that the City of Little Rock had no power to issue bonds, the court (on page 624) quotes section 70 of the general incorporation act, which was passed April 9th, 1869, and then say:

"Under this section of the act, bonds could not be issued

at all, unless voted by the electors of the City, and then to run not less than ten years. The bonds described in the petition were made payable from one to ten years after date, and it is not pretended they were voted by the electors of the City."

Of course they were not. The bonds which the bank surrendered to the City were all issued *before the 9th day of April*, 1869, and the complaint so alleges. The bonds which the bank surrendered were issued while the City was acting under the charter of *December* 12, 1866. The power of the City under the charter it was acting *at the time of the issue of the bonds*, surrendered by the bank to the City, is not discussed in the opinion. The court contents itself by saying the City did not have the power, under the act of April 9th, 1869, to issue such bonds. The tendency of such conduct is, if not explained and denied, to leave the impression on this court that the rights of these parties are to be determined by the act of April 9, 1869, instead of the act of *December* 12, 1866.

Continuing, the court say (p. 629): "The paper in question was issued by the City Council between the first of January, 1868, and the 30th of October, 1874."

The exhibits in the printed record (p. 10 and 11) show that the issue was directed on the 15th of January, 1867, and that in the latter part of 1873, (printed record, p. 24) the bank refused to receive them. The truth of the matter is, that none of these bonds were issued after April 4, 1869, but another class of indebtedness was issued down as late as the year 1872. Here, then, is a misstatement of one year, as to the time the bonds were first issued, and of four years after the issue ceased.

Whether this allusion to the period of time, between January 1st, 1868, and October 30, 1874, as this is the period of time which covers the existence of the State Government, formed under the reconstruction acts of Congress, was intended to convey the impression that the issuing of these small notes or bonds, was the work of the so-called Gothic-vandal horde of "carpet-baggers," whom it is alleged infested the state during that period, we are not prepared to say. No matter how intended, it is untrue in point of fact, and as a matter of public history.

The Mayor and City Council that authorized the issue of the bonds surrendered by the bank to the City, were elected and chosen before the passage of the reconstruction acts.

Continuing, the court say (p. 629): "It is also a matter of public history, that the issuance of this so-called money, *commenced* under the administration of an honorable Mayor, who derived his appointment *from a military commander*, and he, no doubt, honestly concluded that if the power to issue the paper was not to be found in the charter of the City, it might be done under the "*war power.*"

It is not true, as we have stated that the issue of the bonds was "commenced under the administration of an honorable Mayor, who derived his appointment from a miltary commander," and so far as reflection on this court was intended, for upholding the "legal tender" issues of the government under the "war power" clause of the constitution, is concerned, this court must take care of itself.

At page 632, of the opinion, the Court say: " In *Dively v. City of Cedar Falls*, 21 *Iowa*, 569, it was held that notes

issued by the city for the purpose of being used and circulated as money, in violation of the statute, were void, and could not be the basis of a recovery."

No such holding was made in the case alluded to, nor was any such question before the court in that case. But two questions were presented in the case alluded to. One was, whether the court erred, in excluding from the jury a citizen of the City of Cedar Falls, and the court said this was not error. The other was, whether the mayor should have been allowed to answer the question: "Was this scrip issued for the purpose of being circulated as money?" The court ruled that the question ought to have been answered, and for the refusal of the court below to allow the question to be answered, the judgment was reversed, and cause remanded for trial *de novo*. At the trial *de novo*, judgment went against the City of Cedar Falls, and it was afterwards affirmed by the Supreme Court of the State.

Dively v. City of Cedar Falls, 27 *Iowa*, 227.

We are not prepared to say that this misstatement of what was decided in the case of *Dively v. City of Cedar Falls*, was intentional.

There is another matter to which we desire to direct the attention of this court. Whether these notes are void, depends entirely on the fact as to whether they were issued *to circulate as currency*. Whether they were issued to circulate as currency, is a question of *fact*, and not of *law*, and this fact is to be detetmined, not by the use to which they were afterwards put by individuals, but by the intention of the parties *at the time of their issue*.

In *Dively v. City of Cedar Falls*, 27 *Iowa*, 230, the Court said:

"That the members of the City Council may have contemplated, *at the time of voting*, that it might or would become a convenient circulating medium, would not make it money, *nor its issue a violation of law;* nor would the city be relieved from liability by the fact that the scrip was used by individuals, or the community generally as a circulating medium."

In the case of *Whetstone v. Bank of Montgomery*, 9 *Ala.*, 883, the Court said:

"As to the *appearance* of the paper issued by the Railroad Company, resembling Bank Notes, it would be a strong *argument* of the intention of the Railroad Company to make their paper circulate as money. * * * The *appearance* of the bill would not affect any one who might receive it, *with notice of the unlawful intention*, or put them on inquiry *as to the purpose or design of the emission.*

"The question put to the witness, whether the *Directors of the Bank* knew that the paper which was to be issued by the Railroad Company, under contract with the Bank, was *intended* by the same as current Bank bills, or as circulation in the community, was correctly refused.

"Evidence, to be competent, must consist of *facts*, of which the witness has *personal* knowlege, if the question had been whether the witness, being a Director of the Bank, did not know what the intention of the Railroad Company was, in making the contract, it is difficult to conceive how he could have given a legal answer to it, as his answer must necessarily have been either a *deduction from facts* known

to him, from which he *inferred the intention* of the Railroad Company, in the act in question, or he must have derived it from the information of the Directors of the Railroad Company. The first would have been inadmissable, because it would have been *reasoning to the jury*, instead of stating facts, and at last would be mere hearsay, if not his own *reasoning* founded upon such hearsay testimony.

"The *intention*, or secret purpose of the mind, is usually manifested by the acts and declarations of the actor, when the act is done, and it may be, and most usually is, inferred by the jury from the nature of the act, in connection with the surrounding circumstances. It cannot be established by the reasonings, opinions or inferences of *witnesses*."

In the case of *Thomas v. City of Richmond*, 12 *Wall.*, 353, the question of fact, as to whether the notes were issued to circulate as money, was submitted to the court *sitting as a jury*.

In the case of *Bliss v. Anderson*, 31 *Ala.*, 624, a bill in equity was filed to prevent a corporation from issuing certificates of deposit to circulate as money. The question was, whether the description of the certificates in the bill raised the presumption that they were intended to circulate as money. The court said:

"The engraved forms are in the similitude of bank notes, and have the vignettes and other embelishments and characteristics of bank notes. Their *amounts* are designated, as the denomination of bank notes, by marginal letters, and figures; they are numbered and lettered as bank notes; are to be signed by the president and countersigned by the secretary; are for amounts of one, two and three dollars, paya-

ble to bearer on the return of the certificate, which, in effect, is the same as if they were payable, like bank notes, on demand, and in addition to this they are printed on bank note paper.

"The allegation is, that certain engraved forms of certificates of deposit, specimens of which are attached as exhibits to and made a part of the bill, were adopted by the board of directors, and *show upon their face*, that they were intended to pass from hand to hand as money, or in lieu of money. The pleader *does not say*, that the certificates were *intended*, when issued, to circulate as money; but that the *engraved forms* manifest *upon their face* the intent. Is that so? Is the intent a *legal conclusion* from those *engraved forms* and from the fact that they are about to be filled up and emitted? * * * The averment that the *engraved forms* show the intent, is a statement that such is *the conclusion of law*. It is not a conclusion of law, *from the face of the certificates*, that the purpose of their issue would be that they might circulate as money. The averment of the bill is therefore insufficient to show the intent, consequently the bill does not contain equity, and should be dismissed."

By the pleadings in the case of *Lindsay v. Rottaken*, 32 *Ark.*, 619, the question of *fact*, as to whether the bonds were issued to circulate as money, is purposely conceded.

The court say (p. 626): "The petition falls short of avering that they were issued for the purpose of circulating as currency, but the answer supplies the omission, the demurrer admits it, and so the pleaders are in agreement as to the facts."

This is not the state of case which we present to this court. We have no where admitted, and do not intend to admit, that the bonds issued by the city of Little Rock, and surrendered to it by the bank were issued to circulate as currency.

The complaint states (printed record, p. 4), that "the bonds aforesaid, issued as aforesaid, represented at the time they were delivered, the whole, or a fractional part of a just and valid indebtedness of the city of Little Rock, which the city council of said city had found to be legally due some person or persons, and in whose favor the warrant or other evidence of said city had issued, and which said warrant or other evidence of debt had been surrendered to said city, on the receipt of the bonds so issued as aforesaid, *and that said bonds represent no other consideration whatever.*

The proof shows, that the object of the issue of $50,000 of the bonds was to establish free schools, and that the other $50,000 was used in the payment of debts which the city had a right to contract, and did contract. The testimony shows, that the city council tried to avoid the issuing of paper which was inhibited by the statute, and that it was only after the city attorney gave it as his opinion, that if they were issued for the payment of debts, in the form of bonds, that they consented to issue same; yet counsel for the plaintiff in error tells us that this evidences an attempt to evade the law.

It is true that Judge Dillon, in his charge to the jury, says (printed record, p. 30): "That the issuance of City bonds on bank-note paper, engraved with vignettes, in the simlitude of greenbacks, or bank bills, in connection with the undisputed fact that they formed, for a considerable

period, the local circulating medium of the City and community, in lieu of currency, establishes the fact that such bonds were issued for the purpose of circulating as money, in violation of the statute in that regard."

We respectfully submit that the learned judge, there being a jury impaneled to try that very question of *fact*, had no right to determine that question. The charge entirely ignores the *object, purpose and intention of the issue*, and determines the *purpose* and *intention*, not from the acts, conduct and intention of those who issued it, but by the conduct and acts of *third parties after its issue*.

It is also true, that the City Council of the City of Little Rock, in the year 1874, five years after the last of the notes had been issued, in its proceedings, characterizes and describes the bonds as having been "issued to circulate as currency." This description would not make it so. The character of the paper is not to be determined by what the Council of the City might call it, *five years after it was issued*, but by the *intent* of the parties *at the time it was issued*.

The object of all the legislation on the subject of small bills and notes, was to inhibit the use of the *credit* of corporations. It is a well known fact, that all notes issued by banks and corporations, companies and individuals, intended for circulation, represented not *a debt*, but the *credit* of the party issuing the same. It was the *credit* notes and bills which the law sought to suppress, and was not aimed at promissory notes given to evidence *debts*. Hence, where a note or bond was issued as evidence of a valid and subsisting debt, instead of being issued to circulate as money, or currency, the *fact* ought to be allowed to be shown, and the character of the paper thus determined. Intent is the essence of all crimes, and the penalties in the act are against those "who intentionally create or put in circulation."

The City of Little Rock had the unquestioned power to borrow money, issue bonds, and make promissory notes. Whether these bonds or notes are legal, depends on not the form of the bond, the manner of its engraving, or anything of this kind, but on the fact as to whether the City had authority to issue the same.

In the case of *Bank of Montgomery v. Crocheron*, 5 *Ala.*, 254, the court said:

"But as the corporation is authorized, in a certain event, to give out its obligations for the payment of money, as well as prohibited from emitting them as circulation, it follows that the *intention* with which the issue is made, must enter into every emission, and that the act is lawful, or unlawful, as the intention may indicate. Neither the *amount* of the obligation; its *shape*, manner of *engraving*, nor indeed any other circumstance of a similar kind will render the emission a *matter of law* to be determined *by the court;* but the *intention* must be ascertained *by the jury*, upon a view of the circumstances. *The mere indebtedness of the corporation* will not authorize it to emit bills for circulation, although they may have been given to a creditor in the first instance.

"Paper of precisely a similar description may lawfully be issued by the corporation under certain circumstances, *if it be free from the intention to make it a circulation.* Public policy does not require that each individual who is disposed to deal for paper, which is at least lawfully negotiable, should be put upon an inquiry into the *intention* with which it was made, when under the statute it may be lawfully issued under some circumstances.

But let us return to the case of *Lindsay v. Rottaken*, at

period, the local circulating medium of the City and community, in lieu of currency, establishes the fact that such bonds were issued for the purpose of circulating as money, in violation of the statute in that regard."

We respectfully submit that the learned judge, there being a jury impaneled to try that very question of *fact*, had no right to determine that question. The charge entirely ignores the *object, purpose and intention of the issue*, and determines the *purpose* and *intention*, not from the acts, conduct and intention of those who issued it, but by the conduct and acts of *third parties after its issue.*

It is also true, that the City Council of the City of Little Rock, in the year 1874, five years after the last of the notes had been issued, in its proceedings, characterizes and describes the bonds as having been "issued to circulate as currency." This description would not make it so. The character of the paper is not to be determined by what the Council of the City might call it, *five years after it was issued*, but by the *intent* of the parties *at the time it was issued.*

The object of all the legislation on the subject of small bills and notes, was to inhibit the use of the *credit* of corporations. It is a well known fact, that all notes issued by banks and corporations, companies and individuals, intended for circulation, represented not *a debt*, but the *credit* of the party issuing the same. It was the *credit* notes and bills which the law sought to suppress, and was not aimed at promissory notes given to evidence *debts.* Hence, where a note or bond was issued as evidence of a valid and subsisting debt, instead of being issued to circulate as money, or currency, the *fact* ought to be allowed to be shown, and the character of the paper thus determined. Intent is the essence of all crimes, and the penalties in the act are against those "who intentionally create or put in circulation."

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the point where the court takes up the act of November 25, 1837, and where citing its title, says (see 32 *Ark.*, *p.* 636):

"If the scope of this act be limited to the purposes expressed in its title, 'to prevent the circulation of private notes,' it might well be held to embrace paper issued, or put in circulation by individuals, firms, companies, and even private corporations, but paper issued by a municipal corporation could not, with any regard to the meaning of language, be held to be included in the words 'private notes.'"

The *title* to the act, under the Constitution of 1836, was no part of the act, and in States where this is so, it is the first time, in the history of jurisprudence, where the title of an act was construed to be a limitation. The words "private notes" was, no doubt, used in the title of the act, as descriptive of notes which were not issued with the sanction of law, in contradistinction to those notes issued under the authority of law.

Continuing, the Court say (p. 637): "But if it be said the word 'person,' as used in the act, embraces municipal corporations, the punishment prescribed by the second section for creating, or putting in circulation such paper, must necessarily fall on the officers of the corporation, because a corporation is an ideal being, and cannot be indicted or fined."

Lindsay v. Rottaken, 32 *Ark.*, 637.

Since when did municipal corporations become exempt from indictment or fine? But suppose the punishment did fall on the officers of the corporation, had not the Legisla-

ture the power to so provide? Had not the Legislature the power to declare a corporation should be indicted if it violated the law? Is a municipal corporation any less an "ideal being" than any other corporation? If not, how could a public or private corporation be punished?

In commenting on the opinion in *Van Horne v. The State*, 5 *Ark.* 349, the present Supreme Court of Arkansas say:

"He (Judge Lacy) makes the word 'person' and 'company,' as used in the act of November 25, 1837, include corporations, but the act, as we have shown, makes neither persons or corporations liable upon the paper, but makes it criminal to issue it, and penal to vend, pass, receive or offer it in payment. He also seems to have overlooked the fact that the word 'person' was not at all used in the act of February 14, 1838." (p. 642).

While it is no part of our duty to defend Judge Lacy, it is our duty to correct the statement of the court when it has a tendency to mislead. Of course the word "person" is not in the act of February 14, 1838, and Judge Lacy never said it was. The words "drawer, issuer or endorser," are in the act, and either one of them are broad enough to include persons or municipal corporations. What Judge Lacy did say was, that "The act of February 14, 1838, made the drawer, issuer, or endorser of these change tickets, responsible to the holder, or owner of them, by an ordinary suit before a justice of the peace, and directed judgment to be given for the full amount expressed on their face. * * * It is certainly unlawful for corporations to issue such change tickets, and it is equally true, that if they do, *the corporais liable for the amount of such issues.*"

What Judge Lacy said about "persons" was this: "The

term 'person' is used in a general signification, and includes artificial persons, as well as natural ones, and, as a general rule, this the authorities conclusively establish."

In this he is borne out and sustained by ample authority. Because the rule of construction prescribed by the statute itself declares:

"When any subject matter, party or person is described, or referred to, by words importing the singular number, or masculine gender, several matters and persons, and females as well as males, and bodies corporate, as well as individuals, shall be deemed to be included.

Revised Statutes of Arkansas, 1838, *p.* 697.

The words "person or persons,' 'in an act of Congress, extends to corporations.

United States v. Ammedy, 11 *Wheat.*, 392.

The term "person," in a statute, embraces not only natural, but artificial persons, unless the language indicates it was used in a more limited sense.

Planters Bank v. Andrews, 8 *Port.* (*Ala.*), 404.

The word "person," in its legal signification, is a generic term, and was intended to include artificial as well as natural persons.

Douglass v. Pacific Mail Company, 4 *Cal.* 304.

Louisville Railroad v. Commonwealth, 1 *Bush.*, (*Ky.*), 250.

Acts of the character of those now under consideration have always been construed to prevent the mischief, with

the exception of the single case of *Lindsay v. Rottaken*, and in it the acts are so construed as to encourage it. The Court say (p. 640);

"To sum up the legislation on the subject, the Legislature said to all private persons, whether acting individually, or in firms, or companies, you must not issue notes, bills, etc., to circulate as currency, but if you will issue them, you shall be subject, not only to indictment, fine and imprisonment, but shall be liable on the paper.

"The Legislature said to corporations, in language equally emphatic, you shall not issue such paper, but if you will, all officers of such corporations, and others whose names shall be affixed to such paper, shall be individually responsible for the same, and possibly, under the act of November 25, 1837, subject to indictment, fine and imprisonment."

How in the name of common sense could an officer of a corporation be indicted under the act of November 25, 1837, if that act was not aimed at the suppression of notes issued by corporations? What becomes of the theory that the act of November 25, 1837, was aimed at "private notes?" and not those issued by municipal corporations? If the act of November 25, 1837, is broad enough to include the officers of corporations who signed notes in the name of corporations, why is it the act of February 14, 1838, is not broad enough to include such persons, and why the necessity of the remedy given by the second and third sections of the act of December 17, 1838?

It is contended that the case of *Lindsay v. Rottaken*, 32 *Ark.*, 619, covers all the points raised in the case now at

bar, and furnishes this court with a rule of construction which it must follow. This is a very grave error.

The question presented in this case is not really touched in *Lindsay v. Rottaken.* The proposition as to whether (admitting the notes issued to circulate as currency to be void), a recovery can be had upon the common counts for work and labor, and for property and material, is left untouched, as is that of the right to recover on the bonds sued on. It is nowhere stated in *Lindsay v. Rottaken* that the City of Little Rock could not take up our illegal paper which had given out in taking up a legal evidence of debt, and give a good evidence of debt *for an original good consideration.*

We did not recover the judgment complained of upon the the theory that a recovery could be had on the surrendered bonds, and Judge Dillon expressly told the jury (page 34, printed record) that he did not decide that question.

All that is really decided in the case of *Lindsay v. Rottaken* is, that no liability is imposed by statute, or otherwise, which can be recovered in an action *on the notes* issued to circulate as currency. It is true this conclusion is reached by ignoring the provisions of the act of December 12, 1875, and reversing three previous decisions, which may be regarded as contemporaneous constructions of the statutes to which they relate.

We contend that in the cases *of Van Horne v. The State*, 5 *Ark.*, 349, *Anthony Ex parte*, 5 *Ark.*, 361, *and Yeates v. Williams*, 5 *Ark.*, 684, we have shown such a construction of the statutes of November 25, 1837, February

14, 1838, and December 17, 1838, as brings us within the principle laid down in

Gelpcke v. City of Dubuque, 1 *Wall.*, 175.

Lee County v. Rogers, 7 *Wall.*, 181.

Butz v. Muscatine, 8 *Wall.*, 575.

We understand the doctrine laid down in these cases to be, that where the settled decisions in relation to a statute, local in its character, have become rules of property, that this court will not "*immolate truth, justice and the law, because a State tribunal has erected the altar and decreed the sacrifice.*"

That the State court, in the case of *Lindsay v. Rottaken*, have "erected an altar and decreed a sacrifice," in a case where the settled decisions in relation to a statute for a period of thirty-five years was a rule of property, cannot be denied, and the question now remains to be seen whether this court is ready to "immolate truth, justice and the law" in order to place itself in harmony with judicial repudiation.

So far as the case of *Jones v. City of Little Rock*, 25 *Ark.*, 301, is concerned, it has no bearing on this case. The court, in effect, said to Jones, you are a meddling, impertinent person, and cannot be heard to question the acts of the city council, or regulate its conduct.

But it is said the case of *Thomas v. City of Richmond*, 12 *Wall*, 349, is conclusive of this case. We do not think so.

In *Thomas v. City of Richmond* there was a finding of fact, by the court, sitting as a jury, that the notes issued

were intended to be, and were issued as a circulating medium. There is no such finding in the case at bar.

We do not claim that the city of Little Rock, under its charter, had the power to issue notes for circulation as currency. We claim that it had the power to issue bonds, to borrow money, and execute notes and bills to evidence a debt which it may have contracted, and that the question of fact as to whether notes and bills thus issued were issued for the purpose of circulating as currency, is always open to inquiry, and if upon that inquiry it should be ascertained that they were not so issued, the courts would enforce them.

There are many things which takes this case out of the rule laid down in *Thomas v. City of Richmond.* In the case at bar, the statute of February 14, 1838, gave a right of action against the "drawer, issuer, or indorser" of the note or bill. The public policy of Arkansas and Virginia is not in accord. By the law of the state of Arkansas the public policy, in relation to the issue of bills and small notes, was declared as follows:

First. If you issue, put in circulation, sign, countersign, or endorse any note, bond, bill, or check, the issue of which is inhibited by law, you shall be fined not less than fifty dollars nor more than three hundred, and be imprisoned not exceeding twelve months.

Second Section of Act of November 25, 1837.

Second. If you vend, pass, receive or offer in payment such note, bill, bond, or check, you shall forfeit fifty dollars, to be recovered in a civil action, to the use of any person who will sue for the same.

Third Section of Act of November 25, 1837.

Third. In addition to the fine and imprisonment, and liability to forfeit fifty dollars, you shall be liable to the holder, or owner, of each bill, bond, or check, in the full amount of said notes, or bills.

First Section of Act of February 14, 1838.

Fourth. If you sign these notes or bills as the agent, or officer, of a corporation, and not in your individual capacity, you shall be liable individually.

Second Section of Act of December 17, 1838.

The law-makers of Virginia were content with simply imposing a fine and imprisonment. In Arkansas, they were not. In Virginia, by the payment of a light fine and suffering a light term of imprisonment, persons and corporations were licensed to defraud the public. In Arkansas, the law granted no such license. The law said fine and imprisonment shall not operate as an atonement or condonation of your conduct, or operate to your advantage, or furnish you such a protection as to enable you to defraud the public, or any member thereof. The public policy of Arkansas and Pennsylvania is alike, and we contend for the application of the rule laid down in the case of *Allegheny City v. McClurkin & Co.*, 14 *Pa. St.*, 81.

In the case at bar, we had a good and valid evidence of debt, issued by the City of Little Rock; that evidence of debt, at the request of the city, was surrendered, and its bonds received in lieu thereof; afterwards the city asked the holders to surrender the bonds issued to take up the warrants drawn on its treasury, and receive other evidences of debt therefor. The original consideration is free from any taint of illegality, and so was the first evidence of debt

issued. No doctrine of *ultra vires*, intervenes; for the city had full and ample power, to incur the debt, which was incurred, and issue a warrant to pay the same.

The plaintiff in error takes the position that it afterwards tainted the stream back to its fountain head, and that no subsequent act could remove it, and that to this extent is *Thomas v. City of Richmond*. The difference between the cases is, that in the one case, the first act—the issuing the bills—was *ultra vires*, and contrary to positive law, while in the other—the contracting of the debt and the issuing of the warrants—which was the first act, was not *ultra vires*, or contrary to positive law. It may be conceded that the issue of the bonds to take up the warrants, was *ultra vires*, and inhibited by positive statute, but this would not reach back to and destroy anoriginal good consideration, or reach forward and destroy the validity of an evidence of debt which the City had, undoubtedly, the right and power to give.

The fourth instruction given by the court, and which was excepted to by the plaintiff in error, need not be discussed, as its correctness is necessarily involved in that of the third.

This brings us to the fifth and last instruction given by the court, which is: "Under the foregoing views there is no question of the statute of limitations in this case, although it is probable under the call made by the City in 1878, and the action taken thereunder, this defense would, in no event, be available to the City, but it is not necessary to rule the point."

The bonds sued on bear date October 9, 1874, and are due one year after date. The ledger account sued on bears

date November 2, 1874. The suit on the bonds was commenced on the 1st of October, 1877, and the statute of limitations on such instruments is five years. The suit on the ledger account was commenced on the 4th of October, 1877, and the statute of limitation on accounts is three years. Under this state of fact the instruction was corrrct.

At the trial the plaintiff in error excepted to the reading of the bonds, sued on, *"because there was no ordinance authorizing their issue."*

This exception cannot be sustained.

First. The City charter does not provide that an ordinance shall be passed for that purpose. It is true, counsel for plaintiff in error, at page 22 of his argument, reproduces a portion of section fourteen of the charter of the City of Little Rock, of December 12, 1866, from which such an inference might be drawn; but at the time of the issue of the bonds sued on, and to which objection was made to the reading, the City was acting *under the charter of April* 9, 1869.

Second. There was an ordinance authorizing the issue. (See printed record, p. 14).

Third. The bonds recite that they are issued under and in pursuance of the provisions of section 3298, chapter 72, entitled Incorporations, Gantt's Digest of the Statutes of Arkansas, and is for indebtedness of said city of Little Rock incurred previous to the time of the passage of said act." The bond itself recited the act under which it was issued, and the purpose, and *prima facie* proved itself.

(Sec. 3298, is set out at length under the argument to the 4th instruction asked by the plaintiff in error.)

Fourth. The burden of the proof of the plea of *non est factum*, under this state of facts, was on the plaintiff in error.

At page 29, of printed brief, of the plaintiff in error, argument and objection is based on the language of the charge of Judge Dillon, to the jury, wherein he says:

"I cannot say that these decisions are conclusive in settling this statute; but it is clear to my mind that, although this paper was issued in violation of law, the legislature did not intend that the innocent holders of such paper should be held liable to all the penalties imposed on those who receive it by the terms of the first act.

We only call the attention of the court to this, to say that that portion of the charge *is not excepted to* by the plaintiff in error, and, if wrong, cannot be remedied now, or by this court. His exception to the charge commences on page 34 of the printed record, and the expression on which he comments is on page 33 of the same record.

Since our brief was placed in the hands of the printer, the 96th volume of United States Reports (6 Otto) has reached us, containing the case of *Hitchcock v. Galveston.* Had we seen this case, we should have been content to rest our rights upon it.

In the case now at bar, as in the one then at bar, the power of the city to make the contracts, purchases and payments which were made, was not questioned. The point made was, that *bonds* issued or contracted for were *ultra vires*, and this court said (6 *Otto*, 350–51):

"They are not suing *on the bonds*, and it is not necessary to their success that they should assert the validity of those instruments. * * * It matters not that the promise was to pay in a manner not authorized by law. If payment cannot be made in bonds, because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force, so far as it is lawful.

We are not suing on the *bonds*, alone. Nor on those which it is alleged were issued iu violaion of law; nor is it necessary for us to establish their validity in order to recover. The promise to pay was not, originally, in violation of law. The *contract*, out of which the law raises an implied promise to pay, was lawful. The city has received, and now enjoys, the benefit of what it contracted for, and seeks release, not upon the ground it had no power to make the contract, but upon the ground that it induced the holder to surrender a valid evidence of debt, and receive, in lieu thereof, an evidence of debt which, as the city alleges, it had no power to make, and which illegal evidence of debt it afterward took up, of its own accord. This is carrying the doctrine of *ultra vires* entirely too far.

Respectfully submitted,

JOHN McCLURE,
T. D. W. YONLEY,
For Defendant in Error.